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SUPREME COURT CASE NO.

the Supreme Court of the United States

October Term, 1980

AMERICAN FRUIT PURVEYORS, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA
and BOB BERGLAND, Secretary of Agriculture,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Petitioner, AMERICAN FRUIT PURVEYORS, INC., respectfully presents the questions set forth hereinbelow for consideration on the review of the Judgment entered by the United States Court of Appeals for the Fifth Circuit.

1. WHETHER THE SUMMARY AND ARBITRARY FINDING OF "WILLFULNESS" BY THE DEPARTMENT OF AGRICULTURE IN A PROCEEDING FOR THE SUSPENSION OF LICENSE UNDER THE PERISHABLE AGRICULTURAL COMMODITIES ACT HAS UNLAWFULLY DEPRIVED PETITIONER OF ITS FUNDAMENTAL RIGHTS TO NOTICE OF THE UNAUTHORIZED CONDUCT AND THE OPPORTUNITY TO ACHIEVE COMPLIANCE AS MANDATED BY THE ADMINISTRATIVE PROCEDURE ACT.

2. WHETHER THE INITIATION OF THE DISCIPLINARY PROCEEDING AGAINST PETITIONER AND THE IMPOSITION OF A HARSH PUNISHMENT AGAINST PETITIONER IS A RESULT OF THE UNLAWFUL SELECTIVE ENFORCEMENT OF THE PERISHABLE AGRICULTURAL COMMODITIES ACT BY THE DEPARTMENT OF AGRICULTURE.

INDEX

	Pages
QUESTIONS PRESENTED	i
OPINIONS BELOW	2
JURISDICTION	3
STATUTES, FEDERAL RULES, AND REGULATIONS INVOLVED	4
STATEMENT OF THE CASE	6
REASONS FOR GRANTING THE WRIT	9
CONCLUSION	17
APPENDIX	18
CERTIFICATE OF SERVICE	App. 15

CITATIONS

Cases	Pages
American Fruit Purveyors, Inc. v. United States of America and Bob Bergland, Secretary of Agriculture, 632 F.2d 1105 (5th Cir. 1980)	App. 1
American Power Co. v. SEC, 329 U.S. 90 (1943)	15
Butz v. Glover Livestock Commission Co., 411 U.S. 182 (1973)	11, 14
Economou v. United States Department of Agriculture, 494 F.2d 519 (2nd Cir. 1974)	3, 13
F.T.C. v. Universal-Rundle Corp., 387 U.S. 244-251-252, (1967)	15
In Re: American Fruit Purveyors, Inc., 30 A.D. 1542 (1971)	12
J. Acevedo and Sons v. United States, 524 F.2d 977 (5th Cir. 1975)	15
Moog Industries, Inc. v. F.T.C., 355 U.S. 411 (1958)	15
Rodale Press, Inc. v. F.T.C., 407 F.2d 1252 (D.C. Cir. 1968)	13
Union Stock Yard Co. v. United States, 308 U.S. 213, 222-224, (1939)	15

STATUTES

	Pages
5 U.S.C. 558(c)	3, 4, 11, 12, 14
7 U.S.C. 499a et seq.	7
7 U.S.C. 499h(a)	5
7 U.S.C. 499h(b)(4)	5, 6
28 U.S.C. 1254(1)	3, 9
28 U.S.C. 2342(2)	9
28 U.S.C. 2343	9
Title 7, C.F.R. 1.139	8
Title 7, C.F.R. 1.145	8
Title 7, C.F.R. 2.35	16
Title 7, C.F.R. 46.2(aa)(5)	5
Title 7, C.F.R. 46.2(aa)(9)	6

MISCELLANEOUS

	Pages
Fifth Amendment to the United States Constitution	14
Rule 17, Rules of the Supreme Court	4
Rule 15, Federal Rules of Appellate Procedure	9

SUPREME COURT CASE NO. _____

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AMERICAN FRUIT PURVEYORS, INC.,
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UNITED STATES OF AMERICA
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Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

The Petitioner, AMERICAN FRUIT PURVEYORS, INC., prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on November 13, 1980 and the denial of the Petition for Rehearing entered on December 11, 1980.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 632 F.2d 1105 (5th Cir. 1980). The denial of the Petition for Rehearing by the United States Court of Appeals for the Fifth Circuit has not been reported in the latest available edition of the Federal Reporter at the time of the preparation of this Petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on November 13, 1980 and the Petition for Rehearing was denied on December 11, 1980. The respective copies of the Judgment and accompanying Opinion rendered on November 13, 1980 and the Denial of the Petition for Rehearing are appended to this Petition for Writ of Certiorari in the Appendix at pages 1 - 8.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254. Review on certiorari is sought on the grounds that the Fifth Circuit Court of Appeals has sanctioned a serious departure from the accepted and usual course of judicial proceedings or, in this case, quasi-judicial proceedings conducted by the United States Department of Agriculture, which calls for the exercise of this Court's supervisory power. Petitioner further submits that the Federal question decided by the Fifth Circuit Court of Appeals is in conflict with decision rendered by the Second Circuit Court of Appeals in *Economou v. United States Department of Agriculture*, 494 F.2d 519 (2nd Cir. 1974).

Specifically, the Federal question involved in the instant case is the construction of the portion of the Administrative Procedure Act, pertaining to the suspension of a license. The Act, as cofidied in 5 U.S.C. 558, provides that a license may not be subject to disciplinary action unless the licensee is first given notice by the agency in writing of the unlawful conduct and the opportunity to demonstrate compliance with all lawful requirements, unless the violation is "willful". In the instant case, and in a substantial number of similar cases, the Department of Agriculture circumvented the purpose of the

Administrative Procedure Act by failing to furnish Petitioner with notice of its violations and an opportunity to cure same and excusing said failures by their summary findings of "willfulness". While the Fifth Circuit sanctioned the lower Court's approval of this type of procedure, the Second Circuit did not; hence, the conflict between the two Federal Courts which compels this Court's intervention in the matter. The secondary and related issue presented is the selective enforcement practices of the Department of Agriculture. The aforementioned grounds for review are presented to this Court pursuant to Rule 17.1 (a) and (c), Rules of the Supreme Court.

STATUTES, FEDERAL RULES, AND REGULATIONS INVOLVED

The relevant portions of the applicable statutes, rules, and regulations involved in the case at bar are set forth hereinbelow:

5 U.S.C. 558(c)

> (c) . . . Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefore, the licensee has been given —
>
> (1) notice by the agency in writing of the facts or conduct which may warrant the action; and
>
> (2) opportunity to demonstrate or achieve compliance with all lawful requirements.

7 U.S.C. 499h(b)(4)

> It shall be unlawful in or in connection with any transaction in interstate or foreign commerce –
>
> For any commission merchant, dealer, or broker . . . to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction.

7 U.S.C. 499h(a)

> (a) Whenever (a) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of 499b of this title, or (b) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499h(b) of this title, the Secretary may publish the facts and circumstances of such violation and/or order, suspend the license of such offender for a period not to exceed ninty days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender;

Title 7, C.F.R. 46.2(aa)(5)

> ["Full payment promptly"] – Payment for produce purchased by a buyer within ten (10) days after the day on which the produce is accepted.

Title 7, C.F.R., 46.2(aa)(9)

> The parties may by express agreement at the time the contract is made, provide a different time for payment and if they have so agreed, then payment within the time provided shall constitute "full payment promptly" . . . the party claiming the existence of such express agreement as to time of payment shall have the burden of proving it.

STATEMENT OF THE CASE

The disciplinary proceeding against Petitioner was initiated by a Complaint filed by the Director of Fruit and Vegetable Division, Agricultural Marketing Services, United States Department of Agriculture, on July 30, 1976. The Complaint alleges that Petitioner herein purchased and accepted from two (2) sellers in interstate commerce, VIC MAHN's, INC., and SUNNY FARMS, INC., twenty (20) lots of perishable agricultural commodities during the period July through September, 1974, and that Petitioner failed to make full payment promptly in the aggregate amount of $84,996.66 in violation of 7 U.S.C. 499h(b)(4). At the time the reparation order in the case involving VIC MAHN's, INC., was entered, Petitioner had reduced the outstanding balance to $31,076.66, plus interest. Similarly, Petitioner had reduced the balance due to SUNNY FARMS, INC., to $13,000.00, plus interest at the time the reparation order was entered.

The Complaint included the mandate of a Decision and Order issued in PACA Docket No. 2-1574, *In Re: American Fruit Purveyors, Inc., Respondent*, 30 A.D. 1542 (1971), on October 29, 1971, in which a finding was

made that the Petitioner repeatedly and wilfully violated Section 2 of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) through its failure to make full payment promptly for perishable agricultural commodities purchased and received in interstate commerce. The Order suspended Petitioner's license for fourteen (14) days. The suspension was stayed, however, on the condition that the Petitioner did not, within four (4) years following the effective date of the Order and after an opportunity for a hearing,

> "Knowingly fail to pay for produce within the specific periods provided for in the regulation unless (i) the Respondent entered into an express agreement for a definite time period within which payment must be made; (ii) such agreement is reflected in a written confirmation, memorandum, or other document prepared with respect to the transaction; and (iii) the Respondent pays within such agreed period".

The Complaint requested that the fourteen (14) day suspension of Petitioner's license be reinstated because of additional violations concerning late payments made to VIC MAHN's INC., and SUNNY FARMS, INC., during the period July, 1974, through September, 1974, in contravention of the Judicial Officer's Order of October 29, 1979. In addition, the Complaint sought the additional penalty of a ninety (90) day suspension to run consecutively with the fourteen (14) day suspension.

Petitioner filed an Answer on August 24, 1976, admitting the purchase of the commodities at issue between July and September, 1974, but denying the failure to make full payments promptly. The Petitioner

contends that agreements extending the ten (10) day statutory payment period were entered into between itself, on one hand, and VIC MAHN's, INC. and SUNNY FARMS, INC., on the other hand.

The Decision of Administrative Law Judge, JOHN G. LIEBERT, rendered on May 14, 1979, suspended Petitioner's license for a period of fourteen (14) days for violation of an Order of the Judicial Officer entered on October 29, 1971, and affirmed on January 17, 1972, concerning a previous disciplinary proceeding and Petitioner's license was suspended for an additional seven (7) days for the violation constituting the subject matter of the disciplinary proceeding at issue here.

An Appeal Petition was filed on behalf of Petitioner, AMERICAN FRUIT PURVEYORS, INC., pursuant to Section 1.139 and 1.145 of the Rules of Practice (7 C.F.R. 1.139 and 1.145), to appeal the Decision of the Administrative Law Judge, JOHN G. LIEBERT.

Judicial Officer, DONALD CAMPBELL, issued his Decision and Order in this cause on September 28, 1979 without the benefit of oral argument. The Decision of Administrative Law Judge, JOHN LIEBERT, was adopted as the final Decision herein, with the exception of pages 15-21 of said initial Decision concerning Judge LIEBERT's rationale for imposing a seven (7) day additional suspension. Judicial Officer, DONALD CAMPBELL, ordered an additional thirty (30) day suspension, said suspension to run consecutively with the reinstated fourteen (14) day suspension imposed in the Decision and Order rendered in January 17, 1972.

The Petitioner filed a Petition to Reconsider the Decision of the Judicial Officer. Judicial Officer, DONALD A. CAMPBELL entered his Denial of Petition to Reconsider on October 17, 1979. The Petition to Set Aside the Suspension of License was filed on November 26, 1979, in the United States Court of Appeals for the Fifth Circuit. The jurisdiction of the United States Court of Appeals was invoked, pursuant to 28 U.S.C. 2342(2) and Rule 15 of the Federal Rules of Appellate Procedure. Venue properly rested in the Fifth Circuit Court of Appeals under 28 U.S.C. 2343, based upon the location of Petitioner's principal place of business in Miami Beach, Florida.

This is a Petition for Writ of Certiorari to the Supreme Court of the United States of America. The certiorari jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. 1254(1) to set aside the Judgment entered on November 13, 1980, and the denial of the Petition for Rehearing on December 11, 1980, by the Fifth Circuit Court of Appeals in Case Number 79-3815.

REASONS FOR GRANTING THE WRIT

This Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit is predicated upon Rule 19(b), Supreme Court Rules, which provides, in pertinent part, for the exercise of this Court's supervisory power where the lower court has sanctioned a departure from the accepted and usual course of judicial proceedings and where an important question of Federal law should be settled by the Supreme Court, based upon a conflict between the decisions of two or

more Federal courts. Specifically, this Petition shall focus on the central issue of whether Petitioner and, by implication, other entities similarly situated, has been denied the fundamental rights of due process of law by the summary finding of "willfulness" and the selective enforcement of the Perishable Agricultural Commodites Act (PACA) by the Department of Agriculture.

Petitioner respectfully submits that the Department's persistent and cavalier disregard for the letter and the spirit of the Administrative Procedure Act and its inconsistent and capricious pattern of initiating disciplinary action against its licensees compels this limited review of the PACA regulatory scheme by this Court on certiorari. Notwithstanding the limited scope of judicial review of the discretionary actions of administrative agencies, Petitioner submits that the pernicious exercise of administrative action by the Department of Agriculture merits judicial attention just as if a Federal or State agency perpetrated a pattern of discrimination against particular racial, ethnic, religious, or age groups. Petitioner further submits that the trend of previous judicial tolerance of selective enforcement will not be, and should not be, acceptable in the future based upon this Court's decision to evaluate the alleged unconstitutionally discriminatory prosecution of *Hustler* magazine publisher, Larry Flynt, by the city of Cleveland, Ohio.

1. WHETHER THE SUMMARY AND ARBITRARY FINDING OF "WILLFULNESS" BY THE DEPARTMENT OF AGRICULTURE IN A PROCEEDING FOR THE SUSPENSION OF LICENSE UNDER THE PERISHABLE AGRICULTURAL COMMODITIES ACT HAS

UNLAWFULLY DEPRIVED PETITIONER OF ITS FUNDAMENTAL RIGHTS TO NOTICE OF THE UNAUTHORIZED CONDUCT AND THE OPPORTUNITY TO ACHIEVE COMPLIANCE AS MANDATED BY THE ADMINISTRATIVE PROCEDURE ACT.

Petitioner respectfully submits that the summary finding of "willfulness" in this case was made by the Department of Agriculture to subvert the due process requirements of 5 U.S.C. 558(c). The preliminary issue for determination by this Court is whether the violations of the Perishable Agricultural Commodities Act were "willful" and, if so, whether that finding was sufficient to excuse the failure to provide notice of the violations and provide the opportunity to achieve compliance with all lawful requirements.

Petitioner will readily concede that the term "willfulness" has been defined as the careless disregard of the statutory requirements by this Court in *Butz v. Glover Livestock Commission Co.*, 411 U.S. 182 (1973).

The Court noted that:

> "The Court of Appeals agreed that 7 U.S.C. 204 authorized the Secretary to suspend 'any registrant found in violation of the Act', 454 F.2d, at 113, that the suspension procedure here satisfied the *relevant requirements of the Administrative Procedure Act*, 5 U.S.C. 558, and that 'the evidence indicates that (respondent) acted with careless disregard of

> the statutory requirements and thus meets the test of 'wilfullness'." *Id.* at 185. (emphasis supplied).

In the instant case, Judicial Officer, DONALD CAMPBELL, conceded in his Decision and Order dated September 28, 1979, that no notice was ever given to Petitioner regarding the violations alleged. It logically follows that no opportunity was given to Petitioner to demonstrate or achieve compliance with all lawful requirements of the Perishable Agricultural Commodities Act.

In addition, the requirements of 5 U.S.C. 558(c) were similarly ignored earlier case involving this Petitioner, *In re American Fruit Purveyor's Inc.*, 30 A.D. 1542 (1971). In the earlier case, a disciplinary proceeding was initiated against Petitioner, even though Petitioner was not given notice of the violations. A decision was rendered against Petitioner, although the sanction was suspended.

The Second Circuit Court of Appeals went one step further than the *American Fruit* Court and set aside the Order entered in a disciplinary proceeding.

The Court held that:

> " . . . the essential finding of willfulness, now passionately protested, was made in a proceeding instituted without the customary warning letter, which the Judicial Officer conceded might well have resulted in prompt correction of the claimed insufficiencies. Under these circumstances, the finding of willfulness appears erroneous on

the record taken as a whole, and the sanctions imposed unwarranted."

Economou v. United States Department of Agriculture, 494 F.2d 519 (2d Cir. 1974).

In the instant case, the Administrative Law Judge and the Judicial Officer emphasized that the Petitioner had been the subject of an earlier disciplinary proceeding based upon late payment practices, which allegedly imparted constructive notice to Petitioner that its conduct in this case was unauthorized under the Perishable Agricultural Commodities Act. Petitioner would submit that this reasoning essentially constitutes notice under one theory and one cause of action and a decision on another theory and cause of action. When an administrative agency decides a case on a basis other than that upon which it was brought, such as the interjection of the history of prior violations, the denial of the petition to set aside the penalty imposed should be overturned. *Rodale Press, Inc. v. FTC*, 407 F.2d 1252 (D.C. Cir. 1968). Despite any probative value and relevance to the choice and severity of the sanction, due process requires that any case, whether civil, criminal, or administrative, should be decided on its own particular facts, regardless of the prior history of any party involved.

Petitioner respectfully submits that the Fifth Circuit Court of Appeals, notwithstanding its limited scope of judicial review, has sanctioned a serious departure from the accepted and usual course of judicial proceedings by ignoring the failure to provide notice to Petitioner of the facts and conduct constituting the violations alleged in the current disciplinary proceeding and the

consequent failure to provide Petitioner with the opportunity to cure said violations. Petitioner respectfully prays that this Honorable Court exercise its supervisory power to remedy this departure from law by clarifying and reconciling, in terms of the constitutional standards of due process of law, Section 9 of the Administrative Procedure Act, as codified in 5 U.S.C. 558(c). It is submitted that the "willfulness" exception set forth in 5 U.S.C. 558(c), as summarily and indiscriminately applied by the Department of Agriculture, does not comport with the due process clause of the Fifth Amendment to the United States Constitution.

2. WHETHER THE INITIATION OF THE DISCIPLINARY PROCEEDING AGAINST THE PETITIONER AND THE IMPOSITION OF A HARSH PUNISHMENT AGAINST PETITIONER IS A RESULT OF THE UNLAWFUL SELECTIVE ENFORCEMENT OF THE PERISHABLE AGRICULTURAL COMMODITIES ACT BY THE DEPARTMENT OF AGRICULTURE.

Petitioner respectfully submits that the disciplinary proceeding initiated against Petitioner, and the harsh punishment prescribed therein, is an impermissable result of the selective enforcement practices of the Department of Agriculture. The scope of judicial review of administrative action has been succinctly summarized by this Court in *Butz v. Glover Livestock*, supra:

> "We cannot disturb the action of the Secretary, as accomplished through the judicial officer, so long as the proceedings were properly

> conducted in accordance with constitutional and statutory standards, unless the judgment is 'unwarranted in law . . . without justification in fact'. *Id.*, at 185-86, quoting *American Power Co. v. S.E.C.*, 329 U.S. 90, at 112-13 (1943). (emphasis supplied).

The standard review as to the penalty imposed is that judicial action is warranted only if the penalty is "arbitrary, capricious, or unauthorized at law." *J. Acevedo and Sons v. United States*, 524 F.2d 977 (5th Cir. 1975).

The testimony of Robert Grainger, a marketing specialist employed by the Department of Agriculture, was elicited at trial in support of Petitioner's contention that no explicit guidelines were employed by the Department of Agriculture in the selection of parties it decides to prosecute. This pattern of selective enforcement was callously sanctioned by Judicial Officer, DONALD CAMPBELL, who stated, at page 21 of his Decision and Order:

> "But even if a particular violator were singled out for selective enforcement of the Act, such action would be legal so long as the administrative determination was not arbitrary." (see *Moog Industries, Inc. v. F.T.C.*, 335 U.S. 411, 413-414; *F.T.C. v. Universal-Rundle Corp.*, 387 U.S. 244, 251-252; see also *Union Stock Yard Co. v. United States*, 308 U.S. 213, 222-224).

Petitioner submits that the case cited by Judicial Officer, DONALD CAMPBELL, has been negated by this Court's recent decision to hear *Hustler* magazine

publisher Larry Flynt's contention that he was the victim of unconstitutionally discriminatory prosecution by the city of Cleveland, Ohio. Although Petitioner is not a figure of public notoriety such as Mr. Flynt, Petitioner asserts that he is a figure of notoriety in the regulatory body governing the produce business, the Department of Agriculture.

Petitioner asserts that he is a victim of unconstitutionally discriminatory selective enforcement by the Department of Agriculture by virtue of the fact that he did not receive the customary warning letters from the Department of Agriculture in either of the two disciplinary proceedings to which he has been a party. This contention is further bolstered by the fact that Judicial Officer, DONALD CAMPBELL, ignored his own observation that it is the policy of the Judicial Officer never to increase the sanction recommended by the Administrative officials. In this case, the additional suspension of seven (7) days ordered by the Administrative Law Judge was increased to thirty (30) days by the Judicial Officer, to run consecutively with the re-imposed suspension from the 1972 disciplinary proceeding.

Petitioner submits that the unusually harsh sanction is a gross abuse of discretion by the Judicial Officer, the single person in whom is vested the final administrative authority of the Department of Agriculture pursuant to 7 C.F.R. 2.35. Since the punishment was imposed as the direct result of the selective enforcement practices of the Department of Agriculture, the harsh punishment is arbitrary, capricious, and unauthorized at law. Accordingly, Petitioner respectfully prays that this Court remand this cause to the United States Court of Appeals with directions to set aside the suspension of license.

CONCLUSION

For the reasons set forth hereinabove, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED,

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Appendix

A– Opinion of the United States Court of Appeals, Fifth Circuit

B– Judgment of the United States Court of Appeals, Fifth Circuit

C– Order of Denial of the Petition for Rehearing of the United States Court of Appeals, Fifth Circuit

D– 28 U.S.C. 1254

E– Rule 17, Rules of the Supreme Court

F.– Fifth Amendment to the United States Constitution

AMERICAN FRUIT PURVEYORS, INC.
Petitioner,

vs.

UNITED STATES of America and Bob Bergland,
Secretary of Agriculture,
Respondent.

No. 79-3815
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

Nov. 13, 1980.

Before HILL, GARZA and THOMAS A. CLARK, Circuit Judges.

PER CURRIAM:

The present case is on appeal from a decision of the Secretary of the United States Department of Agriculture, through his Judicial Officer, suspending the license of American Fruit Purveyors [AFP]. AFP is a supplier of fresh and frozen fruits and vegetables to hotels, restaurants and steamship lines. The company was licensed in 1958 and has received renewal of that license annually. In 1969, AFP purchased and accepted 17 lots of vegetables, which are considered perishable agricultural commodities, from five sellers and failed to make full payment promptly. On October 29, 1971, following the filing of a complaint by the Department of Agriculture against AFP, the Judicial Officer ordered

that AFP's license be suspended for fourteen days. The Judicial Officer suspended this disciplinary action, stating that the penalty would not become effective unless AFP was found to have, within a four-year period, knowingly failed to pay for produce within the regulation guidelines' ten days period following receipt. The Judicial Officer also ruled that AFP could avoid the ten-day payment rule only if it entered into an express written agreement which stated a definite time period within which to pay and if AFP paid within such an agreed time. The four-year period began to run on February 7, 1972.

During the 1974 crop year, AFP purchased and accepted six shipments of potatoes from Sunny Farms, Inc., located in Edison, California. All orders were made orally, and no written confirmation of such transactions was made. In its usual course of business, Sunny Farms expects payment within ten days of receipt by the purchaser and would cease shipments if payment was not received within two weeks. Sunny Farms did receive a prompt payment for one shipment, but the remaining payments were not forthcoming. In order to liquidate obligations remaining on AFP's account, Sunny Farms agreed to accept postdated checks. A number of these checks were returned due to insufficient funds. In 1975, Sunny Farms filed a complaint with the Secretary of Agriculture seeking reparations. Pursuant to an order by the Judicial Officer, final payment was made by AFP in 1976.

During the same crop-year of 1974, AFP also purchased and accepted a number of shipments of fruit and vegetables from Vic Mahns, Inc., located in Pompano

Beach, Florida. No written agreement of these transactions was ever made. The original terms of the oral agreement required payment within one week of receipt, but this was later altered to a three week period. Harry Sturm, president of the corporation which owns AFP, disputed this arrangement, contending that the agreement was that AFP would pay when it was able. Again, AFP failed to pay promptly and Vic Mahns seized its shipments. Vic Mahns also agreed to accept postdated checks to liquidate AFP's account. Some of these checks were returned due to insufficient funds. Vic Mahns filed a complaint seeking reparations, and following another order of the Judicial Officer, Vic Mahns and AFP entered into a settlement agreement.

A complaint was then filed by the director of the Fruit and Vegetable Division, Agricultural Marketing Service of the USDA against AFP seeking disciplinary action under the Perishable Agricultural Commodities Act [PACA], 7 U.S.C. §§499a 499s, for failure to make payments promptly on twenty lots of perishable agricultural commodities. Following an evidentiary hearing, the Administrative Law Judge [ALJ] found the AFP had not made payments in ten days as required by §499b, that it had not entered into an express agreement for a different pay period and AFP's actions violated the order of the Judicial Officer of October 29, 1971. Based upon his findings of fact, the ALJ reinstated the fourteen day suspension issued on October 29, 1971. Although the USDA recommended an additional penalty of ninety days suspension for the 1974 violations, the ALJ imposed an additional suspension of seven days to run consecutively with the fourteen days.

Both AFP and the Department of Agriculture appealed this decision to the Judicial Officer. The Judicial Officer denied AFP's request for oral argument on the ground that no novel or complex issues were raised, the case was thoroughly briefed and oral argument would serve no useful purpose. The Judicial Officer affirmed the ALJ's decision except that portion regarding the imposition of the seven day additional suspension. The Judicial Officer, finding "a callous disregard for the requirements of the Act and the prior probationary order," increased the seven day suspension to thirty days to run consecutively, making it a total of forty-four days suspended.

A stay was subsequently entered, pending an appeal to this court. Following the grant of the stay, the Judicial Officer denied a Petition to Reconsider filed by AFP. The stay order remained in effect. AFP now raises three issues on appeal: 1) AFP did not knowingly and willfully fail to make prompt payments for twenty lots of perishable agricultural commodities; 2) AFP did satisfy the requirements of the 1971 order regarding written confirmation; 3) the Secretary of Agriculture gave no notice to AFP of the 1974 violations and found AFP guilty of a willful violation without giving it an opportunity to comply; and 4) the suspension in this case is arbitrary and capricious.

In reviewing the findings and order of the Judicial Officer of the Department of Agriculture, an appellate court may not substitute its judgment for that of the Judicial Officer, *Lewis v. Butz*, 512 F.2d 681, 683 (8th Cir. 1975), and his decision may only be overturned if it is unwarranted in law or without justification in fact. *Butz v. Glover Livestock Commission Co.*, 411 U.S. 182,

185-86, 93 S.Ct. 1455, 1457-58, 36 L.Ed.2d 142 (1973); *Noell v. Bensinger*, 586 F.2d 554, 558 (5th Cir. 1978).

7 U.S.C. §499b(4) provides in part that it shall be unlawful in any transaction in interstate commerce "for any commission merchant, dealer, or broker . . . to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in [perishable agricultural commodities] to the person with whom such transaction is had . . ." The term "full payment promptly" means "payment for produce purchased by a buyer, within ten days after the day on which the produce is accepted." 7 C.F.R. §46.-2(aa)(5). The ten day rule is inapplicable if the parties by express agreement at the time of the creation of the contract provide for a different time of payment 7 C.F.R. §46.2(aa)(9).

Contrary to AFP's contention, it did not make prompt payment to Sunny Farms or Vic Mahns, Inc. AFP concedes that there was never an express written agreement with either company. The testimony from the depositions and the hearing clearly indicates that neither Vic Mahns nor Sunny Farms held their buyers to the strict ten day rule. Although both companies preferred to follow the ten day rule, they would accept payment within relatively short times following acceptance, two weeks for Sunny Farms and three weeks for Vic Mahns, Inc. In Vic Mahns, Inc.'s case, AFP and Vic Mahns specifically agreed to a three-week time period. Nonetheless AFP failed to pay within those periods and did not completely satisfy its account until after ordered to do so by the Secretary of Agriculture through the reparation proceedings.

Likewise, Sunny Farms made it clear that it desired payment within two weeks, which payments were never completely satisfied until after the Judicial Officer's decision in the reparation proceedings. The acceptance of postdated checks by Vic Mahns and Sunny Farms in an effort to liquidate their accounts can, by no stretch of the imagination, be considered prompt payment. Neither Vic Mahns nor Sunny Farms agreed to accept the postdated checks as part of the original payment agreement. Even if the acceptance of postdated checks could be considered as prompt payment, the return of a number of those postdated checks for insufficient funds would negate any claim of prompt payment.

The Judicial Officer was correct in finding that there were twenty separate violations, although AFP contends there were only two continuous transactions, one with Vic Mahns and one with Sunny Farms. Each lot was clearly a separate transaction, which is corroborated by one of Vic Mahn's sellers who stated that the sales involved were each individual orders.

Additionally, AFP violated the 1971 order during the four year period of probation. That order required any prompt payment beyond ten days to be confirmed by an express written memorandum. The order also required that AFP make payment within that agreed time. AFP did neither, and this court finds AFP's argument that the acceptance by Sunny Farms and Vic Mahns of postdated checks satisfied the requirements of the 1971 order to be wholly without merit.

AFP also contends that the Judicial Officer's decision is unwarranted in law and without justification in fact since the Department of Agriculture failed to follow

the mandates of 5 U.S.C. §558(c). Section 558(c) provides that suspension of a license is lawful only if the license is given notice and an opportunity for a hearing, except in cases of willfulness. Thus, no notice is necessary if the suspension proceeding is based on willfulness. Under PACA, an action is willful if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements. *Haltmier v. Commodity Futures Trading Commission*, 554 F.2d 556, 562 (2d Cir. 1977); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir. 1974), *cert denied*, 419 U.S. 830, 95 S.Ct. 53, 42 L.Ed.2d 55 (1974). In light of the 1971 order, there is not possibility that AFP did not know that failure to pay promptly was a violation of the regulations and the statute and that failure to obtain an express written agreement was a knowing violation of both the regulations and the 1971 order. No notice to AFP was required in this case, and the finding of willfulness was correct.

AFP also contends that the sanction imposed is arbitrary and capricious. AFP also claims that the sanction amounts to cruel and unusual punishment under the Eighth Amendment. AFP contends that the USDA has practiced selective enforcement against it and that the Judicial Officer has arbitrary and unbridled discretion in this area. The choice of sanctions imposed by the Secretary of Agriculture, through his Judicial Officer, may not be overturned in the absence of a patent abuse of discretion. *Moog Industries, Inc. v. Federal Trade Commission*, 355 U.S. 411, 414, 78 S.Ct. 377, 379, 2 L.Ed.2d 370 (1958) (per curiam); *Haltmier v. Commodity Futures Trading Commission*, 554 F.2d at 563. 7 U.S.C. §499h(a) allows the Secretary to suspend a license for a period not to exceed ninety days for each violation. It

has been held that suspensions may be imposed even without a finding of intentional or fraudulent conduct. See *Maine Potato Growers, Inc. v. Butz*, 540 F.2d 518, 523 (1st Cir, 1976).

In the present case, AFP committed flagrant intentional violations of the Act, the underlying regulations and the 1971 order. Although the suspension of a license is a harsh sanction, the Judicial Officer was completely within his power and discretion in imposing a suspension of forty four days. Although the Judicial Officer possesses a great deal of discretion, this Court does not find it to be an unbridled or unreasonable amount of discretion. The Supreme Court has held that uniformity of sanctions for similar violations is not mandated by the Act. *Butz v. Glover Livestock Commission Co.*, 411 U.S. at 186, 93 S.Ct. at 1458. Merely because a sanction in one case is more severe than that imposed in a similar case does not render the sanction illegal. *Id.* at 187, 93 S.Ct. 1458. This Court perceives no bias on the part of the ALJ or the Judicial Officer in rendering their decisions. This Court also can find no evidence of selective enforcement and considers AFP's claim of cruel and unusual punishment to be inapplicable to the present case and totally without merit.

PETITION DENIED, ORDER ENFORCED.

United States Court of Appeals

FOR THE FIFTH CIRCUIT
October Term, 19

NO. 79-3815
Summary Calendar

PACA Docket No. 2-4355

AMERICAN FRUIT PURVEYORS, INC.,
Petitioner,

versus

UNITED STATES OF AMERICA and
BOB BERGLAND, Secretary of Agriculture,
Respondent.

Petition for Review of an Order of the Secretary of the United States Department of Agriculture

Before HILL, GARZA and THOMAS A. CLARK, Circuit Judges.

JUDGMENT

This cause came on to be heard on the petition of American Fruit Purveyors, Inc. for review of an order of the Secretary of the United States Department of Agriculture, and was taken under submission by the Court upon the record and briefs on file pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the petition for review is denied and the order of the Secretary of the United States Department of Agriculture is enforced;

It is further ordered that petitioner pay to respondent the costs on appeal, to be taxed by the Clerk of this Court.

November 13, 1980

ISSUED AS MANDATE:

[FILED DEC 11, 1980]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 79-3815

AMERICAN FRUIT PURVEYORS, INC.,
Petitioner,

versus

UNITED STATES OF AMERICA and
BOB BERGLAND, Secretary of Agriculture,
Respondent.

Petition for Review of an Order of the Secretary of the United States Department of Agriculture

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ON PETITION FOR REHEARING
(December 11, 1980)

Before HILL, GARZA and THOMAS A. CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

United States Circuit Judge

§1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for

Rule 17

CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, and of any other court whose judgments are reviewable by law on writ of certiorari.

Fifth Amendment to the United States Constitution

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, exept in cases arising in the land or naval forces, or in the Militia, when in

actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law;* nor shall private property be taken for public use without just compensation. (emphasis supplied as to pertinent part).

CERTIFICATE OF SERVICE

Petitioner, AMERICAN FRUIT PURVEYORS, INC., by and through its undersigned counsel, hereby certifies that three (3) true and correct copies of this Petition for Writ of Certiorari have been mailed this ___ day of January, 1981, to each of the following:

SOLICITOR GENERAL OF THE UNITED STATES
Tenth and Constitution
Northwest Washington, D.C. 20530

UNITED STATES DEPARTMENT OF
AGRICULTURE
OFFICE OF THE SECRETARY
Washington, D.C. 20250

I FURTHER CERTIFY that a true and correct copy of this Petition For Writ of Certiorari was mailed this _____ day of January, 1981, to each of the following:

DONALD A. CAMPBELL, JUDICIAL OFFICER
U.S. DEPARTMENT OF AGRICULTURE
Office of the Secretary
Washington, D.C. 20250

JOHN G. LIEBERT
ADMINISTRATIVE LAW JUDGE
U.S. DEPARTMENT OF AGRICULTURE
Office of the Secretary
Washington, D.C. 20250

ED SILVERSTEIN, ESQUIRE
Attorney for Complainant
U.S. DEPARTMENT OF AGRICULTURE
Office of the Secretary
Washington, D.C. 20250

OFFICE OF THE ATTORNEY GENERAL
BENJAMIN CIVILETTI, ESQUIRE
Room 5111
DEPARTMENT OF JUSTICE
Washington, D.C. 20530

LAW OFFICES OF RBM
1491 South Miami Avenue
Miami, Florida 33131
(305) 371-3988

By _____
RBM

80-1215

FILED
MAR 4 1981
ALEXANDER L. STEVAS, CLERK

SUPREME COURT CASE NO.

in the

Supreme Court

of the

United States

October Term, 1980

AMERICAN FRUIT PURVEYORS, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA
and BOB BERGLAND, Secretary of Agriculture,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

SUPPLEMENT TO PETITIONER'S APPENDIX

RICHARD B. MARX, ESQUIRE
Counsel for Petitioner
Law Offices of Richard B. Marx
1491 South Miami Avenue
Miami, Florida 33131
(305) 371-3988

A. Decision and Order of Administrative Law Judge John G. Liebert, dated May 14, 1979 ..... App. 1-25

B. Decision and Order of Judicial officer Donald Campbell, dated September 28, 1979 ... App. 26-55

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

PACA Docket No. 2-4355

Decision

In re:
American Fruit Purveyors, Inc.
Respondent

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930 as amended, (7 U.S.C. 499a *et seq.*), hereinafter referred as the Act, instituted by a complaint filed by the Director of Fruit and Vegetable Division, Agricultural Marketing Services, United States Department of Agriculture, on July 30, 1976. The complaint alleges that Respondent, a licensee under the Act, during the period July through September, 1974, purchased and accepted from two sellers in Interstate Commerce 20 lots of perishabie agricultural commodities but failed to make full payment promptly of the agreed purchased prices, or of balances thereof, totaling $84,996.66 in violation of 7 U.S.C. 499b. Additionally, the complaint alleges that the above failures to pay violates the provisions of an Order issued by the Judicial Officer of the United States Department of Agriculture on October 29, 1971, in which he suspended Respondent's license for a period of 14 days, but held such suspension in abeyance for four years providing

Respondent complied with the provisions of said Order during that period.

In this action, Complainant requests that, because of the violation of the Judicial Officer's Order of October 29, 1971, the 14-day suspension of Respondent's license therein provided be instituted and, further, that as a consequence of the additional violations during the period July through September, 1974, there be added an additional sanction of a 90-day suspension, such suspensions to run consecutively.

Respondent filed an Answer on August 24, 1976, in which it admits the purchases of the commodities during the period July through September 1974, as alleged, but denies there was a failure to make full payments promptly. Respondent avers that the 14-day suspension in the Judicial Officer's Order of October 29, 1971, is barred because the alleged violations during the period July through September 1974, took place after the termination of the 4-year period specified in the Order.

Hearing on this matter was held in Miami Beach, Florida on January 24, 1978, before Administrative Law Judge John G. Liebert. At the hearing Complainant was represented by Bonnie L. Luken, Esq., Office of the General Counsel, United States Department of Agriculture, and Respondent was represented by Richard B. Marx, Esq., 2951 South Bay Shore Drive, Miami, Florida. At the conclusion of the hearing the parties were given an opportunity to file Proposed Findings of Fact and Briefs. The final brief in the matter was filed on August 17, 1978.

Pertinent Sections of the Act Involved

In pertinent part the provisions of the Act relevant to this proceeding provide:

"§499b. Unfair conduct

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce —

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; (underscoring added)

(7 U.S.C. 499b.)

§499h. Grounds for suspension or revocation of license / Authority of Secretary

(a) Whenever (a) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or (b) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, the Secretary may publish the facts and circumstances of such violation and / or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender; x x x

(7 U.S.C. 499h.)

§499o. Rules, regulations, and orders; appointment, removal, and compensation of officers and employees; expenditures; appropriations; abrogation of inconsistent statutes

The Secretary may make such rules, regulations, and orders as may be necessary to carry out the provisions of this chapter, x x x"

(7 U.S.C. 499o)

Pertinent Provisions of the Regulations Involved

In pertinent part the provisions of the Regulations issued by the Secretary of Agriculture under the Act and which are relevant to this proceeding provide:

§46.2 Definitions.

(aa) "Full payment promptly" is the term used in the act in specifying the period of time for making payment without committing a violation of the act. "Full payment promptly," for the purpose of determining violations of the act, means:

(5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted;

(9) x x x *Provided, however,* That as an exception to paragraphs (aa) (1) through (9) of this section, the parties may, by express agreement at the time the contract is made, provide a different time for payment, and if they have so agreed, then payment within the time provided shall constitute "full payment promptly": *Provide further,* That the party claiming the existence of such express agreement as to time of payment shall have the burden of proving it."

(7 C.F.R. 46.2)

Findings of Fact

1. Respondent, American Fruit Purveyors, Inc. is a Florida corporation doing business at 730 First Street, Miami Beach, Florida. On June 2, 1958, pursuant to the provisions of the Act, Respondent was issued license number 176120. This license has been renewed annually and is presently in effect.

2. On October, 29, 1971, the Judicial Officer on appeal from the decision of the Administrative Law Judge issued a final Decision in a disciplinary action against Respondent, *In re American Fruit Purveyors, Inc.* (PACA Doc, No. 2-1574), 30 A.D. 1542, (1971). The Order issued as a result of the Decision provides:

"Order

> Effective on the 15th day after service hereof upon respondent, the license of respondent is suspended for a period of 14 days. Such suspension, however, is suspended and shall not become effective unless respondent shall be found, after opportunity for hearing, to have, *within four years following the effective date of this order*, knowingly failed to pay for produce within the specific periods provided for in the regulations unless (i) the respondent enters into an express agreement for a definite time period within which payment must be made, (ii) such agreement is reflected in a written confirmation memorandum, or other document prepared with respect to the transaction, and (iii) the respondent pays within such agreed period.
>
> This order shall be published and copies hereof shall be served upon the parties."

3. On January 17, 1972, the Judicial Officer issued a Ruling on Complainant's Petition for Reconsideration of his Decision and Order (31 A.D. 122, (1972)), issued in the above-mentioned proceeding. After denying the petition for reasons stated, the Judicial Officer affirmed

his Order of October 29, 1971, and made that Order "effective on the 15th day after service hereof on respondent." The docket discloses that service was obtained on Respondent on January 22, 1972. Such Order then became finally effective on February 7, 1972.

4. The uncontroverted facts are that during the 1974 crop year Respondent, in the course of interstate commerce, purchased, received and accepted from Sunny Farms. Inc., a seller located in Edison, California, 6 car loads of potatoes having a total value of $66,674.00 with allowances. A first shipment of potatoes was made on or about June 5, 1974, and for this shipment Respondent issued a check dated June 20, 1974, in the amount of $8,912.50 which was the complete payment for this shipment. The shipping season was finished on or about July 24, 1974. The remaining 5 car loads were shipped prior to that date.

The record discloses that on August 13, 1974, Sunny Farms, Inc. sent the following letter to Respondent demanding payment of the balance due for these shipments:

"August 13, 1974
American Fruit Purveyors, Inc.
730 1st Street
Miami Beach, Florida 33139

Re: Our File No. 733- 61 days old
Car No. UPFE 452639
Shipped 6/12/74
Our File No. 856- 54 days old
Car No. UPFE 451642

Shipped 6/20/74
Our File No. 1158- 38 days old
Car No. SPFE 453646
Shipped 7/6/74
Our File No. 1019- 45 days old
Car No. SPFE 453549
Shipped 6/29/74

We are forwarding copies of the invoices on the above referenced shipments to you. You will note that these shipments range from 61 days old to 38 days old. All of which are well over the normal payment requirements under PACA regulations.

We shipped you our first car on the 5th of June and received payment dated the 20th of June so we know full well that you can make prompt and timely payment when it is in your interest. When you requested of Mr. Marvin Berry that we again start shipping to you it was with the understanding and agreement that you make prompt and timely payment. We are asking that you keep your word and forward to us full and complete payment of the above indicated shipments.

Please forward to us by return mail your check in the amount of $44,219.50."

As stated in this letter it was clearly Sunny Farms' understanding that the manner in which Respondent was making payment was not in accordance with its understanding of the agreement. Exhibits and depositions indicate that it was company's policy to collect within 10 days after shipment, and that if payment was not made within 2 weeks to cease shipments to the customer. This is corroborated by the company's action at the

time as expressed in the above letter. Evidence of record discloses that sometime following August 13, 1974, Sunny Farms agreed to accept post-dated checks to liquidate the obligations remaining on Respondent's account with them. Certain of these checks when presented to the bank were paid, others, in the total amount of $23,706.00, were returned by the bank for "insufficient funds." Checks representing $15,706.00 were not honored by the bank.

5. Because of the long delay in payment, Sunny Farms, Inc. on March 4, 1975, filed with the Secretary of Agriculture, pursuant to the Act, a complaint seeking reparations in the amount of balance still owing on the account in the amount of $15,706.00 A subsequent payment made after the filing of the complaint reduced the balance due to $13,000. On February 4, 1976; the Judicial Officer after a full hearing on the matter issued a Decision, (35 A.D. 151, (1972)), in this reparation action wherein he found *inter alia:*

> "Respondent admits that a balance of $13,000 is owed the Complainant. The question in this case concerns whether there was an agreement between the parties as to when payment was due and if there was such an agreement, was payment made within the time provided by such agreement.
>
> The evidence reflects the fact that an agreement for payment was made whereby Respondent was to give Complainant a series of checks that would eventually liquidate the debt as the checks became due. The evidence indicates that the checks were presented for

payment after the dates shown thereon. It is undisputed that four checks were not paid, due to insufficient funds.

Based on the evidence presented, we conclude that Respondent and Complainant agreed to payment by the use of a series of checks and that Respondent defaulted on its obligations. We conclude that Respondent received and accepted the lots of potatoes which are the subject of this proceeding. We further conclude that a balance is due and owing to Complainant from Respondent of $13,000. Respondent's failure to pay this balance to Complainant is in violation of Section 2 of the Act, for which reparation should be awarded as damages to Complainant with interest."

The Order issued in this reparation proceeding is as follows:

"Order

Within 30 days from the date of this order, Respondent shall pay to Complainant as reparation $13,000, with interest thereon at the rate of 8 percent per annum from September 1, 1974, until paid. In addition, Respondent shall pay to Complainant as additional reparation, $822.93, with interest thereon at the rate of 8 percent per annum, from the date of this order until paid."

By letter dated March 15, 1976, Sunny Farms, Inc. advised the agency that it had received a final payment of the award.

6. On the basis of the evidence presented at this hearing, and on the further evidence of the Judicial Officer's decision in the reparations action concerning these shipments, we find that Respondent did not make payment within the 10-day period after receipt of these shipments as provided by the Regulations. Moreover, we further find that there was no express agreement or custom of doing business between the parties in effect at the time of shipments which *substantially* altered the requirement of the Regulation. The post-dated checks were issued by Respondent to liquidate the accrued obligation in a manner agreed upon between the parties to settle the past due account. Even this agreement was violated by the issuance of "insufficent fund" checks.

We further find that the conduct of Respondent in this matter of making payment to Sunny Farms, Inc., clearly violated the expressed conditions of the Judicial Officer in his Order of October 29, 1971, *supra*, and that such transactions took place well within the 4-year period specified in said Order for withholding the 14 day suspension.

7. The evidence discloses that during 1974 Respondent made a series of purchases of perishable agricultural commodities from Vic Mahns, Inc., a seller located in Pompano Beach, Florida. Between April 19 and September 25, 1974, during the course of these transactions it is uncontroverted that Respondent purchased, received and accepted 18 lots of fruits and vegetables. This produce originated outside the state of Florida and was, therefore, in the current of interstate commerce. No express written agreement with respect to the time of payment was entered into between the

parties, however, testimony of record is that Respondent had an agreement for making payments against a running balance maintained by Vic Mahns for all produce purchased. The original arrangement for paying on this account was that payment for shipments would be made in one week. This arrangement was later altered to extend the payment period to three weeks after receipt of shipments. Witnesses for both parties to the agreement confirmed this understanding. On or about September 25, 1974, Vic Mahns stopped making shipments to Respondent because of slow payment on the account. On October 2, 1974, after the cessation of shipments by the seller, the unpaid balance on the account was $57,076.66, and Vic Mahns requested payment. Vic Mahns' agent, after discussions with Respondent, accepted a series of post-dated checks to liquidate the entire account. As these checks were deposited with the bank some were honored by payment and others were returned for "insufficient funds." Two additional cash payments were made on the account in the aggregate amount of $4,000.

Because of the delay in payment of the account and the non-payment of the post-dated checks, Vic Mahns, Inc., on January 27, 1975, filed with the Secretary of Agriculture, pursuant to the Act, a complaint seeking reparations in the amount of the balance then owing of $33,076.66. Within a short time thereafter Respondent made two additional cash payments totaling $2,000.

8. On December 23, 1975, after full hearing on the matter, the Judicial Officer issued a Decision in this reparation's action, (34 A.D. 1950, (1975)), wherein he found *inter alia:*

"The remaining questions for discussion in this case concern the alleged existence of an agreement between the parties regarding the manner of payment, whether such agreement between the parties regarding the manner of payment was carried out, and if "full payment promptly" was provided for.

Respondent admits that the money is owed to complainant but alleges that a payment plan involving post dated checks was entered into between the parties and that such plan was being carried out according to the mutual understanding of the complainant and the Respondent. The evidence clearly shows that during the dealings between the parties, the Respondent gave checks to the complainant that did not clear due to insufficient funds. Respondent alleges that complainant, contrary to the agreement, presented post dated checks for payment prior to the date on the checks. Respondent has presented no evidence in support of this latter allegation and there is no evidence in the record to indicate that any checks were not paid due to early presentment. Rather, the evidence shows that the reason for non-payment of the checks was, as stated above, insufficient funds. Mr. Sturm, the president of American Fruit Purveyors, alleging that indefiniteness as to payment time was agreed to by the parties.

The regulations provide, as a definition of the "full payment promptly" provision of the Act, that payment for produce purchased by a buyer is prompt if paid for within 10 days after the day on which the produce is accepted. (See 7 CFR 46.2(aa) (5)). The regulations also provide that as an exception to the normal time periods for payment the parties may enter into an express agreement for payment within a different time (7 CFR

46.2(aa) (9)). The party claiming the existence of such an express agreement has the burden of proof. Respondent has not met this burden.

We find that the evidence is sufficient to establish that complainant sold and that Respondent received and accepted the lots of fruits and vegetables which are the subject of this proceeding. We conclude further that the evidence is sufficient to establish the total of the contract prices as being $57,076.66, of which Respondent has made payments totaling $26,000, leaving a balance due and owing complainant of $31,076.66. Respondent's failure to pay this balance to complainant is a violation of section 2 of the Act, for which reparation should be awarded with interest."

The Order issued in this reparation proceeding is as follows:

"Order

> Within thirty days from the date of this order, Respondent shall pay to Complainant as reparation $31,076.66 with interest thereon at the rate of 8% per annum from October 1, 1974, until paid. In addition, Respondent shall pay to Complainant as additional reparation $502.85 with interest thereon at the rate of 8% per annum, from the date of this Order until paid."

On April 27, 1976, Vic Mahns, Inc. and Respondent entered into a settlement agreement by which the reparation award was deemed satisfied.

9. On the basis of the evidence presented at this hearing, and on the further evidence of the Judicial Officer's Decision in the reparations action concerning these shipments, we find that Repondent did not make payment within the three-week period after receipt of the last several lots of these shipments as agreed at time of shipment. The post-dated checks were issued by Respondent to liquidate the accrued obligation in a manner acceptable to Vic Mahns as a way of cleaning up the account which was past due. Even this method of payment was violated by the issuance of "insufficient fund" checks.

We further find that the conduct of Respondent in this matter of making payment to Vic Mahns, Inc. clearly violated the expressed conditions of the Judicial Officer in his Order of October 29, 1971. *supra*, and that such transaction took place well within the 4-year period specified in said Order for withholding the 14-day suspension.

10. At the hearing Respondent's attorney raised a series of objections to the admissibility of the depositions of William J. Rommel and Marvin Berry. We have examined these depositions in the light of the cross-interrogatories and find them acceptable for the purposes for which they were offered. They, in the main, only corroborate the testimony of the witnesses at the hearing, and the other evidence presented, which of itself constitutes the principal basis for these findings. Further, we find no evidence of bias in the selection of the person who was ordered to take the depositions.

Conclusions

On the basis of the foregoing Findings of Fact we conclude that the 14-day suspension of Respondent's license must be instituted to comply with the Judicial Officer's Order issued on October 29, 1971, and made effective on February 7, 1972.

On the basis of the Findings of Fact we further conclude that Respondent's repeated failures to make full payment promptly to the two shippers in the several transactions in 1974 constitute repeated and flagrant violations of 7 U.S.C. 499b (4) of the Act, as further interpreted and defined by §46.2 (aa) (5) and (9) of the Regulations, (7 C.F.R. 46.2 *et seq.*). We further find that such violations were "wilful" as that term is defined and interpreted in a decision by the Judicial Officer under the Act involving Respondent. "Wilfulness mean 'no more than that the person charged with the duty knows what he is doing' ", *In re American Fruit Purveyors, Inc.*, 30 A.D. 1542, 1588, (1971). Here there is no question about Respondent's knowledge that it's payment practices were not in accordance with the Judicial Officer's Order. We are mindful, also, as the evidence discloses, of the Respondent's history of violation of the prompt and full payment requirements imposed on a licensee by the Act and the Regulations.

While these violations as found herein serve to institute the 14-day suspension for the previously found violations of the Act, the question remains as to whether or not an additional sanction should be imposed for these additional violations. Complainant requests the additional sanction of a 90-day suspension which, if imposed, would close down Respondent's business for

104 days. This, short of revocation of the license, is the maximum sanction which is authorized by the Act.

For guidance in this matter of an appropriate sanction under the Act we turn again to the Judicial Officer's discussion and establishment of sanction guidelines under the Act as found in *In re American Fruit Purveyor's, Inc., supra.* We are mindful that the Administrative Law Judge's initial Decision on the facts in that case proposed a 60-day suspension of Respondent's license on the recommendation of Complainant. This was not adopted by the Judicial Officer on appeal, however, and he imposed the Order of a 14-day suspension held in abeyance for 4 years subject to compliance with the prescribed conditions. We conclude that the principles and rationale set forth in that Decision constitute the Secretary's policy to be applied in the instant case. This portion of the Decision, (pps. 1593-1597 omitting only the footnotes), holds:

> "We come now to the most difficult part of this case-*viz.*, the determination of the sanction to be imposed. It is helpful to consider, first, several general principles relating to the imposition of administrative sanctions.
>
> In the House Report on the bill which became the Perishable Agricultural Commodities Act, 1930, it is stated that the "purposes of the bill are to be made effective through a system of licensing with penalties for violations." H. Rep. No. 1041, 71st Cong., 2d Sess., p. 3. The substance provisions of the bill are then enumerated in the report, and it is stated that "[v]iolations of any of the foregoing provisions are punishable

by a suspension or revocation of the license of the offender" (*ibid.*).

Although the legislative report refers to "penalties" and to violations that are "punishable" by a suspension order, it has been recognized that the suspension of an adminsitrative license "is not primarily punishment for a past offense but is a necessary power granted to the Secretary of Agriculture to assure a proper adherence to the provisions of the Act." *Nichols & Co. v. Secretary of Agriculture*, 131 F.2d 651, 659 (C. A. 1).

In *Eastern Produce Co. v. Benson*, 278 F.2d 606, 610 (C. A. 3), the Court rejected the contention that a suspension order under the Perishable Agricultural Commodities Act is purely punitive, stating:

The order invokes only a civil, administrative remedy. The issue was put to rest in Helvering v. Mitchell, 1938, 303 U.S. 391, 388, * * * where Justice Brandeis indicated that "remedial sanctions may be of varying types. One which is characteristically free of the punitive criminal element is revocation of a privilege voluntarily granted." We concur with the expressed opinions of the First and Seventh Circuits that "suspension of a registrant is not primarily punishment for a past offense but is a necessary power granted to the Secretary of Agriculture to assure a proper adherence to the provisions of the Act." Nichols & Co. v. Secretary of Agriculture, 1 Cir., 1942, 131 F.2d 651, 659, modified in another particular on rehearing, 1

Cir., 1943, 136 F.2d 503; Daniels v. United States, 7 Cir., 242 F.2d 39, 42, certiorari denied 1957, 354 U.S. 939. * * *.

Revocation or suspension of a license "is not a penalty" but is "to protect the public interest" against future violations. *Blaise D'Antoni & Associates, Inc., v. Securities & Exch. Com'n.*, 289 F.2d 276, 277 (C. A. 5), certiorari denied, 368 U.S. 899.

Unquestionably, then, a suspension order may be issued to deter the particular respondent from future violations.

In *Beck v. Securities and Exchange Commission*, 430 F.2d 673, 675 (C. A. 6), the Court questioned, without deciding, whether a suspension order may be used to deter others in the regulated industry from committing similar violations. However, anyone intimately acquainted with the administration of a regulatory program knows that it is necessary to at least consider, as one of many relevant circumstances, the effect of the sanction in a particular case on others in the regulated industry.

See, *e.g.*, *American All Transport and Flight School, Inc., Enforcement Proceeding*, 2 Pike & Fisher Ad. L. 2d 213, 215 (C.A.B.). See, also, the dissenting opinion in *Beck v. Securities and Exchange Commission*, 413 F.2d 832, 834 (C. A. 6).

The remedial provisions of a regulatory program would be drastically affected if the agency could consider the effect of a sanction only on the respondent and not on others. It is well recognized that a regulated trade

keeps abreast of administrative proceedings, and the actions of potential violators could be significantly affected by the sanctions imposed against other persons. The Perishable Agricultural Commodities Act expressly provides for publishing the facts and circumstances of violations (7 U.S.C. 499h). Such publicity is to deter others from violating.

If administrative sanctions are too lenient, rather than being a deterrent, they will be a stimulant to violations by others. Since, as stated above, the purpose of a suspension order is to "assure a proper adherence to the provisions of the Act," the deterrent effect on the respondent and on the regulated industry must be considered.

Another important principle is that the sanctions imposed under a regulatory Act against different violators for similar violations should be reasonably uniform. From the beginning, the Judicial Officer has recognized that "[d]isciplinary action taken under * * * [a regulatory] act should follow some general pattern, * * * so that one order will not be entirely out of line with another involving similar violations." *In re Watkins Commission Company, Inc.*, 4 Agriculture Decisions 395, 400. In another case, he reiterated this doctrine, saying "respondent should be suspended as a registrant under the act for a period of 30 days, which is less than recommended by complainant, to achieve some uniformity of sanctions for similar violations of the act in other cases." *In re Milton Silver, d/b/a Chambersburg Livestock Sales*, 21 Agriculture Decisions 1438, 1452.

In *In re Boone Livestock Company, Inc., 27* Agriculture Decisions 475, 503, the Judicial Officer

reduced the suspension of two years proposed by the Hearing Examiner and recommended by the complainant because "past suspensions imposed for similar kinds of violations, some of comparable flagrancy, have not been for as extensive a period as that recommended by the Hearing Examiner." He gave "notice to the industry" in that case that future violations "may well result in more severe sanctions in appropriate cases." See, also, *In re Arnold Fairbank*, 27 Agriculture Decisions 1371, 1384; *In re Nolan E. Poovey, Jr.*, 27 Agriculture Decisions 1512, 1520-1522.

It has been a common practice of the Judicial Officer in determining sanctions under the Perishable Agricultural Commodities Act to look to and rely upon the sanctions imposed in other similar cases under the Act. See, e.g. *In re Bailey Produce Co. Inc.*, Agriculture Decisions 1403, 1405; *In re Eastern Produce Distributors, Inc.*, 11 Agriculture Decisions 217, 218; *In re Southern Transportation Co.*, 12 Agriculture Decisions 743, 745; *In re Nat Rosenthal*, 15 Agriculture Decisions 550, 560, affirmed, 278 F.2d 606 (C.A. 3); *In re William D. Bethea*, 22 Agriculture Decisions 824, 827; *In re Turner Produce*, 25 Agriculture Decisions 87, 89.

Another significant principle is that there should be a reasonable relation between the sanction and the unlawful practices found to exist. In other words, the more serious the violation, the more severe should be the sanction. For example, all other things being equal, a complete failure to pay warrants a more severe sanction than failure to pay promptly. The additional element of fraud by an agent also ordinarily would justify a more severe sanction than a similar case not involving fraud. See *In re Woodrow Vernon Herrin*, 23 Agriculture Decisions 691, 702.

Looking then at the respondent's violations, we find that the respondent failed to pay promptly nine firms in 35 separate transactions. In many of these transactions, the produce was not paid for for five, six, or seven months. In 15 of the transactions, involving four firms, the respondent paid only after formal reparation awards were issued. The respondent's failure to pay promptly was an unjustified imposition on the shippers of the produce. The shippers in these transactions were forced involuntarily to finance the respondent.

> The administrative sanctions imposed under the Act should be structured to prevent this type of violation insofar as possible. Where a firm intentionally fails to pay promptly in numerous transactions, a temporary suspension of the firm's license would ordinarily be appropriate. In the most recent litigated case under the Act involving a firm's failure to pay promptly 48 lots of produce (the delay in payment ranging from 21 to 175 days), the firm's license was suspended for 15 days. *In re William D. Bethea*, 22 Agriculture Decisions 824, 826-827. However, in the *Bethea* case, there were no mitigating circumstances. As far as the record in that case shows, the respondent intentionally failed to pay promptly. In the present case, on the other hand, as far as the record shows, the respondent not only thought that it had implied agreements which justified delays in payment, but the respondent also notified the complainant of its views on a number of occasions, and there is no evidence in the record that the complainant ever corrected the respondent's misunderstanding.

> In these circumstances, rather than impose an active suspension, as was done in the *Bethea* case, I believe that it is more appropriate to suspend the respondent's license for two weeks, but hold the suspension in abeyance for a period of four years, conditioned upon the respondent paying promptly during such period. See *In re E. M. Hall*, 18 Agriculture Decisions 964, 968."

The evidence in the instant case discloses that Respondent does approximately three and one-half to four million dollars worth of business a year, employs from 25 to 30 employees, and has been in operation for over 40 years. Both of the sellers eventually, after the issuance of compelling reparations Orders, were paid. The underlying facts in the instant case were similar in amounts involved and economic impact to those which were involved in the previous action resulting in the 1971 Decision.

In the previous Decision the threat of license suspension for 14-days was considered to be a sufficient deterrent to cause Respondent to comply with the Act. It was not. However, the realities of an actual suspension is a matter of considerably more deterrent weight. This is the effect of the institution of the sanction in the Judicial Officer's Order. Obviously, the Judicial Officer regarded a 14-day suspension to be a heavy one under the circumstances. It will impact now. Every additional day added to that suspension has more weight because of the cumulative effect on Respondent's business.

In full consideration of the facts in the instant case, and applying our understanding of the Judicial Officer's policy as set forth above, we conclude that an

additional sanction of a 7 days suspension is warranted. The effect of this action will be to suspend Respondent's operations for a period of 21 days from the effective date of the Order entered herein.

The Findings of Fact and Conclusions herein were made after full consideration of the entire record and are based upon the more credible and probative, as well as the preponderance of the evidence presented. All motions, requests, or arguments which are not specifically mentioned herein, and which are inconsistent with the Findings of Fact and Conclusions, are denied.

Order

Respondent's license is suspended for a period of 14 days for violation of the Order of the Judicial Officer entered on October 29, 1971, and affirmed on January 17, 1972.

Respondent's license is suspended for a further period of 7 days for violations found in the instant proceeding. The periods of the suspensions shall run consecutively.

This Order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof unless appealed to the Secretary by a party to the proceeding within thirty days after service

as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. 1.139 and 1.145).

Copies hereof shall be served on the parties.

Done this 14th day of May, 1979
Washington, D.C.

John G. Liebert
Administrative Law Judge

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

PACA Docket No. 2-4355

Decision and Order

In re:
American Fruit Purveyors, Inc.,
Respondent

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a et seq.), in which Administrative Law Judge John G. Liebert filed an initial Decision and Order on May 14, 1979, suspending respondent's license for 14 days for violating an order issued by the Judicial Officer in 1971 because of respondent's slow payment practices and for an additional 7 days because of respondent's present slow payment practices.

The complainant, seeking a more severe sanction, and the respondent, seeking no sanction, appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to the Administrative Procedure Act has been delegated (7 CFR 2.35).[1]

[1]The office of Judicial Officer is a career position established pursuant to the Act of April 4, 1940 (7 U.S.C. 450c-450g), and Reorganization Plan No. 2 of 1953 (5 U.S.C. 1976 ed., Appendix, p. 764). The present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

Oral argument before the Judicial Officer, which is discretionary (7 CFR 47.40 (a)), was requested by respondent, but is denied inasmuch as no novel or complex issues are raised on appeal, the case has been thoroug' ly briefed and oral argument would seem to serve no useful purpose.

For the reasons set forth below, I believe that respondent's license should be suspended for 14 days for violating the prior order and for an additional 30 days for the present violations.

Upon a careful consideration of the record in this case, the initial Decision, except for pp. 15-21 thereof dealing with Judge Liebart's reasons for imposing a seven day suspension for the present violations, is adopted as the final Decision herein, with slight changes, followed by additional conclusions and the order by the Judicial Officer.

ADMINISTRATIVE LAW JUDGE'S DECISIONS (AS MODIFIED)

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930 as amended, (7 U.S.C. 499a *et. seq.*), hereinafter referred as the Act, instituted by a complaint filed by the Director of Fruit and Vegetable Division, Agricultural Marketing Services, United States Department of Agriculture, on July 30, 1976. The complaint alleges that Respondent, a licensee under the Act, during the period July through September, 1974, purchased and accepted from two sellers in interstate commerce 20 lots of perishable agricultural

commodities but failed to make full payment promptly of the agreed purchase prices, or of balances thereof, totaling $84,996.66 in violation of 7 U.S.C. 499b. Additionally, the complaint alleges that the above failures to pay violate the provisions of an Order issued by the Judicial Officer of the United States Department of Agriculture on October 29, 1971, in which he suspended Respondent's license for a period of 14 days, but held such suspension in abeyance for four years providing Respondent complied with the provisions of said Order during that period.

In this action, Complainant requests that, because of the violation of the Judicial Officer's Order of October 29, 1971, the 14-day suspension of Respondent's license therein provided be instituted and, further, that as a consequence of the additional violations during the period July through September, 1974, there be added an additional sanction of a 90-day suspension, such suspensions to run consecutively.

Respondent filed an Answer on August 24, 1976, in which it admits the purchases of the commodities during the period July through September 1974, as alleged, but denies there was a failure to make full payments promptly. Respondent avers that the 14-day suspension in the Judicial Officer's Order of October 29, 1971, is barred because the alleged violations during the period July through September 1974, took place after the termination of the 4-year period specified in the Order.

Hearing on this matter was held in Miami Beach, Florida on January 24, 1978, before Administrative Law Judge John G. Liebert. At the hearing Complainant

was represented by Bonnie L. Luken, Esq., Office of the General Counsel, United States Department of Agriculture, and Respondent was represented by Richard B. Marx, Esq., 2951 South Bay Shore Drive, Miami, Florida. At the conclusion of the hearing the parties were given an opportunity to file Proposed Findings of Fact and Briefs. The final brief in the matter was filed on August 17, 1978.

Pertinent Sections of the Act Involved

In pertinent part the provisions of the Act relevant to this proceeding provide:

> §499b. Unfair conduct
>
> It shall be unlawful in or in connection with any transaction in interstate or foreign commerce—
>
> (4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to

the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; (underscoring added)

(7 U.S.C. 499b.)

§499h. Grounds for suspension or revocation of license — Authority of Secretary

(a) Whenever (a) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or (b) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender; x x x

(7 U.S.C. 499h.)

§499o. Rules, regulations, and orders; appointment, removal, and compensation of officers and employees; expenditures; appropriations; abrogation of inconsistent statutes

The Secretary may make such rules, regulations, and orders as may be necessary to carry out the provisions of this chapter, x x x"

(7 U.S.C. 499o)

Pertinent Provisions of the Regulations Involved

In pertinent part the provisions of the Regulations issued by the Secretary of Agriculture under the Act and which are relevant to this proceeding provide:

§46.2 Definitions.

(aa) "Full payment promptly" is the term used in the act in specifying the period of time for making payment without committing a violation of the act. "Full payment promptly," for the purpose of determining violations of the act, means:

(5) Payment for produce purchased by a buyer within 10 days after the day on which the produce is accepted;

(9) x x x *Provided, however,* That as an exception to paragraphs (aa) (1) through (9) of this section, the parties may, by express agreement at the time the contract is made, provide a different time for payment, and if they have so agreed, then payment within the time provided shall constitute "full payment

promptly": *Provided further*, That the party claiming the existence of such express agreement as to time of payment shall have the burden of proving it."

(7 C.F.R. 46.2)

Findings of Fact

1. Respondent, American Fruit Purveyors, Inc. is a Florida corporation doing business at 730 First Street, Miami Beach, Florida. On June 2, 1958, pursuant to the provisions of the Act, Respondent was issued license number 176120. This license has been renewed annually and is presently in effect.

2. On October 29, 1971, the Judicial Officer on appeal from the decision of the Administrative Law Judge issued a final Decision in a disciplinary action against Respondent, *In re American Fruit Purveyors, Inc.* (PACA Doc. No. 2-1574), 30 A.D. 1542, (1971). The Order issued as a result of the Decision provides:

"Order

Effective on the 15th day after service hereof upon respondent, the license of respondent is suspended for a period of 14 days. Such suspension, however, is suspended and shall not become effective unless respondent shall be found, after opportunity for hearing, to have, *within four years following the effective date of this order*, knowingly failed to pay for produce within the specific periods provided

for in the regulations unless (i) the respondent enters into an express agreement for a definite time period within which payment must be made, (ii) such agreement is reflected in a written confirmation, memorandum, or other document prepared with respect to the transaction, and (iii) the respondent pays within such agreed period.

This order shall be published and copies hereof shall be served upon the parties."

3. On January 17, 1972, the Judicial Officer issued a Ruling on Complainant's Petition for Reconsideration of his Decision and Order (31 A.D. 122, (1972)), issued in the above-mentioned proceeding. After denying the petition for reasons stated, the Judicial Officer affirmed his Order of October 29, 1971, and made that Order "effective on the 15th day after service hereof on respondent." The docket discloses that service was obtained on Respondent on January 22, 1972. Such Order then became finally effective on February 6, 1972.

4. The uncontroverted facts are that during the 1974-crop year Respondent, in the course of interstate commerce, purchased, received and accepted from Sunny Farms, Inc., a seller located in Edison, California, 6 car loads of potatoes having a total value of $66,674.00 with allowances. A first shipment of potatoes was made on or about June 5, 1974, and for this shipment Respondent issued a check dated June 20, 1974, in the amount of $8,912.50 which was the complete payment for this shipment. The shipping season was finished on or about July 24, 1974. The remaining 5 car loads were shipped prior to that date.

The record discloses that on August 13, 1974, Sunny Farms, Inc. sent the following letter to Respondent demanding payment of the balance due for these shipments:

"August 13, 1974

American Fruit Purveyors, Inc.
730 1st Street
Miami Beach, Florida 33139

Re: Our File No. 733 — 61 days old
Car No. UPFE 452639
Shipped 6/12/74
Our File No. 856 — 54 days old
Car No. UPFE 451642
Shipped 6/20/74
Our File No. 1158 — 38 days old
Car No. SPFE 453646
Shipped 7/6/74
Our File No. 1019 — 45 days old
Car No. SPFE 453549
Shipped 6/29/74

Gentlemen:

We are forwarding copies of the invoices on the above referenced shipments to you. You will note that these shipments range from 61 days old to 38 days old. All of which are well over the normal payment requirements under PACA regulations.

We shipped you our first car on the 5th of June and received payment dated the 20th of

June so we know full well that you can make prompt and timely payment when it is in your interest. When you requested of Mr. Marvin Berry that we again start shipping to you it was with the understanding and agreement that you make prompt and timely payment. We are asking that you keep your word and forward to us full and complete payment of the above indicated shipments.

Please forward to us by return mail your check in the amount of $44,219.50."

As stated in this letter it was clearly Sunny Farms' understanding that the manner in which Respondent was making payment was not in accordance with its understanding of the agreement. Exhibits and depositions indicate that it was company's policy to collect within 10 days after shipment, and that if payment was not made within 2 weeks to cease shipments to the customer. This is corroborated by the company's action at the time as expressed in the above letter. Evidence of record discloses that sometime following August 31, 1974, Sunny Farms agreed to post-dated checks to liquidate the obligations remaining on Respondent's account with them. Certain of these checks when presented to the bank were paid, others, in the total amount of $23,706.00, were returned by the bank for "insufficient funds." Checks representing $15,706.00 were not honored by the bank.

5. Because of the long delay in payment, Sunny Farms, Inc. on March 4, 1975, filed with the Secretary of Agriculture, pursuant to the Act, a complaint seeking reparations in the amount of balance still owing on the

account in the amount of $15,706.00. A subsequent payment made after the filing of the complaint reduced the balance due to $13,000. On February 4, 1976, the Judicial Officer after a full hearing on the matter issued a Decision, (35 A.D. 151, (1976)), in this reparation action wherein he found *inter alia:*

> "Respondent admits that a balance of $13,000 is owed the Complainant. The question in this case concerns whether there was an agreement between the parties as to when payment was due and if there was such an agreement, was payment made within the time provided by such agreement.
>
> The evidence reflects the fact that an agreement for payment was made whereby Respondent was to give Complainant a series of checks that would eventually liquidate the debt as the checks became due. The evidence indicates that the checks were presented for payment after the dates shown thereon. It is undisputed that four checks were not paid, due to insufficient funds.
>
> Based on the evidence presented; we conclude that Respondent and Complainant agreed to payment by the use of a series of checks and that Respondent defaulted on its obligations. We conclude that Respondent received and accepted the lots of potatoes which are the subject of this proceeding. We further conclude that a balance is due and owing to Complainant from Respondent of $13,000. Respondent's failure to pay this balance to Complainant is in violation

of Section 2 of the Act, for which reparation should be awarded as damages to Complainant with interest."

The Order issued in this reparation proceeding is as follows:

"Order

Within 30 days from the date of this order, Respondent shall pay to Complainant as reparation $13,000, with interest thereon at the rate of 8 percent per annum from September 1, 1974, until paid. In addition, Respondent shall pay to Complainant as additional reparation, $822.93, with interest thereon at the rate of 8 percent per annum, from the date of this order until paid."

By letter dated March 15, 1976, Sunny Farms, Inc. advised the agency that it had received a final payment of the award.

6. On the basis of the evidence presented at this hearing, and on the further evidence of the Judicial Officer's decision in the reparations action concerning these shipments, we find that Respondent did not make payment within the 10-day period after receipt of these shipments as provided by the Regulations. Moreover, we further find that there was no express agreement or custom of doing business between the parties in effect at the time of shipments which *substantially* altered the requirement of the Regulation. The post-dated checks were issued by Respondent to

liquidate the accrued obligation in a manner agreed upon between the parties to settle the past due account. Even this agreement was violated by the issuance of "insufficient fund" checks.

We further find that the conduct of Respondent in this matter of making payment to Sunny Farms, Inc., clearly violated the expressed conditions of the Judicial Officer in his Order of October 29, 1971, *supra*, and that such transactions took place well within the 4-year period specified in said Order for withholding the 14 day suspension.

7. The evidence discloses that during 1974 Respondent made a series of purchases of perishable agricultural commodities from Vic Mahns, Inc., a seller located in Pompano Beach, Florida. Between April 19 and September 25, 1974, during the course of these transactions it is uncontroverted that Respondent purchased, received and accepted 18 lots of fruits and vegetables. This produce originated outside the state of Florida and was, therefore, in the current of interstate commerce. No express written agreement with respect to the time of payment was entered into between the parties, however, testimony of record is that Respondent had an agreement for making payments against a running balance maintained by Vic Mahns for all produce purchased. The original arrangement for paying on this account was that payment for shipments would be made in one week. This arrangement was later altered to extend the payment period to three weeks after receipt of shipments.

On or about September 25, 1974, Vic Mahns stopped making shipments to Respondent because of slow payment

on the account. On October 2, 1974, after the cessation of shipments by the seller, the unpaid balance on the account was $57,076.66, and Vic Mahns requested payment. Vic Mahns' agent, after discussions with Respondent, accepted a series of post-dated checks to liquidate the entire account. As these checks were deposited with the bank some were honored by payment and others were returned for "insufficient funds." Two additional cash payments were made on the account in the aggregate number of $4,000.

Because of the delay in payment of the account and the non-payment of the post-dated checks, Vic Mahns, Inc., on January 27, 1975, filed with the Secretary of Agriculture, pursuant to the Act, a complaint seeking reparation in the amount of the balance then owing of $31,076.66. Within a short time thereafter Respondent made two additional cash payments totaling $2,000.

8. On December 23, 1975, after full hearing on the matter, the Judicial Officer issued a Decision in this reparations action, (34 A.D. 1950, (1975)), wherein he found *inter alia:*

> "The remaining questions for discussion in this case concern the alleged existence of an agreement between the parties regarding the manner of payment, whether such agreement between the parties regarding the manner of payment was carried out, and if "full payment promptly" was provided for.
>
> Respondent admits that the money is owed to complainant but alleges that a payment plan involving post dated checks was entered

into between the parties and that such plan was being carried out according to the mutual understanding of the complainant and the Respondent. The evidence clearly shows that during the dealings between the parties, the Respondent gave checks to the complainant that did not clear due to insufficient funds. Respondent alleges that complainant, contrary to the agreement, presented post dated checks for payment prior to the date on the checks. Respondent has presented no evidence in support of this latter allegation and there is no evidence in the record to indicate that any checks were not paid due to early presentment. Rather, the evidence shows that the reason for non-payment of the checks was, as stated above, insufficient funds. Mr. Sturm, the president of American Fruit Purveyors, alleged in his testimony at the hearing that there was no definite payment schedule. Mr. Sturm appears to be alleging that indefiniteness as to payment time was agreed to by the parties.

The regulations provide, as a definition of the "full payment promptly" provision of the Act, that payment for produce purchased by a buyer is prompt if paid for within 10 days after the day on which the produce is accepted. (See 7 CFR 46.2(aa) (5)). The regulations also provide that as an exception to the normal time periods for payment the parties may enter into an express agreement for payment within a different time (7 CFR 46.2(aa) (9)). The party claiming the existence of such an express

agreement has the burden of proof. Respondent has not met this burden.

We find that the evidence is sufficient to establish that complainant sold and that Respondent received and accepted the lots of fruits and vegetables which are the subject of this proceeding. We conclude further that the evidence is sufficient to establish the total of the contract prices as being $57,076.66, of which Respondent has made payments totaling $26,000, leaving a balance due and owing complainant of $31,076.66. Respondent's failure to pay this balance to complainant is a violation of section 2 of the Act, for which reparation should be awarded with interest."

The Order issued in this reparation proceeding is as follows:

"Order

Within thirty days from the date of this order, Respondent shall pay to Complainant as reparation $31,076.66 with interest thereon at the rate of 8% per annum from October 1, 1974, until paid. In addition, Respondent shall pay to Complainant as additional reparation $502.85 with interest thereon at the rate of 8% per annum, from the date of this Order until paid."

On April 27, 1976, Vic Mahns, Inc. and Respondent entered into a settlement agreement by which the reparation award was deemed satisfied.

9. On the basis of the evidence presented at this hearing, and on the further evidence of the Judicial Officer's Decision in the reparations action concerning these shipments, we find that Respondent did not make payment within the three-week period after receipt of the last several lots of these shipments as agreed at time of shipment. The post-dated checks were issued by Respondent to liquidate the accrued obligation in a manner acceptable to Vic Mahns as a way of cleaning up the account which was past due. Even this method of payment was violated by the issuance of "insufficient fund" checks.

We further find that the conduct of Respondent in this matter of making payment to Vic Mahns, Inc. clearly violated the expressed conditions of the Judicial Officer in his Order of October 29, 1971, *supra*, and that such transactions took place well within the 4-year period specified in said Order for withholding the 14-day suspension.

10. At the hearing Respondent's attorney raised a series of objections to the admissability of the depositions of William J. Rommel and Marvin Berry. We have examined these depositions in the light of the cross-interrogatories and find them acceptable for the purposes for which they were offered. They, in the main, only corroborate the testimony of the witnesses at the hearing, and the other evidence presented, which of itself constitutes the principal basis for these findings. Further, we find no evidence of bias in the selection of the person who was ordered to take the depositions.

Conclusions

On the basis of the foregoing Findings of Fact we conclude that the 14-day suspension of Respondent's license must be instituted to comply with the Judicial Officer's Order issued on October 29, 1971, and made effective on February 6, 1972.

On the basis of the Findings of Fact we further conclude that Respondent's repeated failures to make full payment promptly to the two shippers in the several transactions in 1974 constitute repeated and flagrant violations of 7 U.S.C. 499b (4) of the Act, as further interpreted and defined by §46.2 (aa) (5) and (9) of the Regulations, (7 C.F.R. 46.2 *et seq.*). We further find that such violations were "wilful" as that term is defined and interpreted in a decision by the Judicial Officer under the Act involving Respondent. "Wilfulness means 'no more than that the person charged with the duty knows what he is doing' ", *In re American Fruit Purveyors, Inc.*, 30 A.D. 1542, 1588, (1971). Here there is no question about Respondent's knowledge that it's payment practices were not in accordance with the Judicial Officer's order. We are mindful, also as the evidence discloses, of the Respondent's history of violation of the prompt and full payment requirements imposed on a licensee by the Act and the Regulations.

While these violations as found herein serve to institute the 14-day suspension for the previously found violations of the Act, the question remains as to whether

or not an additional sanction should be imposed for these additional violations.

* * * * *

The Findings of Fact and Conclusions herein were made after full consideration of the entire record and are based upon the more credible and probative, as well as the preponderance of the evidence presented. All motions, requests, or arguments which are not specifically mentioned herein, and which are inconsistent with the Findings of Fact and Conclusions, are denied.

ADDITIONAL CONCLUSIONS BY JUDICIAL OFFICER

In its appeal, pages 4-12, respondent reargues its version of the facts, but there is abundant evidence to support Judge Leibert's Findings of Fact adopted above. In particular, respondent argues (Appeal, p. 9):

> The shippers' acceptance of post-dated checks as part of the Respondent's payment agreements with VIC MAHN'S, INC. and SUNNY FARMS, INC., absolves the Respondent of any alleged violation of the statutory payment period.

However, most of the post-dated checks were issued after the violations had already occurred, and once a violation has occurred, no subsequent agreement between the parties negates the violation. As stated in *In re M. & H. Produce Co.*,34 Agr. Dec. 700, 743 (1975), affirmed (without opinion) *sub nom. M. & H. Produce Co. v. Knebel and United States*, 549 F.2d 830 (C.A. D.C.), certiorari denied, 98 Sup.Ct. 394:

> An agreement to extend the time for payment made after a violation of the Act has occurred does not cure the violation. A private person has no power to annul a violation of an Act of Congress once it has occurred.

In addition, a number of the post-dated checks were returned for insufficient funds and, therefore, respondent did not even abide by its agreement to pay when the post-dated checks became due.

Respondent also argues that, in any event, there were only 2 transactions rather than 20 as alleged in the complaint and, therefore the violations were not "repeated." (Appeal, p. 10). However, the evidence, both oral and documentary, shows clearly that there were 20 separate transactions as alleged in the complaint. For example, Samuel Rosenzweig, who negotiated the 18 transactions on behalf of Vic Mahn's, Inc., testified (Tr. 75):

> Q. During the period of August 1974 through October 1974, did you sell a number of shipments of produce to the respondent in this proceeding, American Fruit Purveyors?
>
> A. I did.
>
> Q. Did you negotiate the sales for the purchase of this produce over a period of time or did you take these orders at one time?
>
> A. It was individual orders at intervals.
>
> Q. You took individual orders?

A. Correct.

In view of the respondent's failure to pay promptly in the 20 transactions alleged in the complaint in this proceeding, respondent violated the order issued in 1971 in the earlier disciplinary proceeding instituted because of respondent's slow payment practices.

In addition, the 1971 order would have been violated even if respondent had agreements for deferred payment and paid within the terms of those agreements since there was no written documentation as to any agreement. The requirement that respondent's agreements for deferred payment be "reflected in a written confirmation, memorandum, or other document prepared with respect to transaction" was an important part of the order which placed respondent on probation. The evidence in the earlier proceeding indicated that there had been many disputes between respondent and its suppliers with respect to whether deferred payment agreements existed, and to eliminate any doubt in this respect during the four year probationary period, it was determined that "[w]ritten confirmations, memoranda, or other documents must be prepared with respect to such agreements specifically setting forth such express agreements" (Ex. No. 1, p. 80). In this respect, respondent argues (Appeal, p. 13):

> Although the Respondent admits that there were no written agreements recording its express payment arrangement with VIC MAHN'S, INC., and SUNNY FARMS, INC., (T-195), the Respondent did secure written documentation of said agreements. The acceptance and presentment of checks, whether

> post-dated or not, issued by the Respondent to the shippers in payment of the purchase price under the express payment agreements constitutes written documentation of the agreements varying the ten (10) day payment rule.

That argument is frivolous. The acceptance and presentment of a check in payment of a transaction cannot under any stretch of the imagination be regarded as a written confirmation, memorandum, or document reflecting an agreement for deferred payment.

With respect to the two transactions involving Sunny Farms, Inc., respondent also argues that the 1971 order requirements were not applicable because there was no finding within four years of the effective date of the order that respondent failed to comply with the order (Appeal, p. 13). That argument is also frivolous. The four year period in the order plainly applies to respondent's conduct during the four year probationary period irrespective of when the hearing with respect to any alleged violation is concluded. Specifically, the order provides (Ex. No. 1, p. 81):

> Such suspension, however, is suspended and shall not become effective unless respondent shall be found, after opportunity for hearing, to have, within four years following the effective date of this order, knowingly failed to pay for produce within the specific periods provided for * * *.

The four year period clearly modifies "to have * * * knowingly failed to pay."

The clear and unambiguous terms of the order are also supported by the explanation in the decision, which explains that the four year period relates to the period during which respondent shall be subject to the payment requirements of the order. Specifically, the order states (Ex. No. 1 p. 80):

> In these circumstances, rather than impose an active suspension, as was done in the *Bethea* case, I believe that it is more appropriate to suspend the respondent's license for two weeks, but hold the suspension in abeyance for a period of four years, conditioned upon the respondent paying promptly during such period. See *In re E. M. Hall*, 18 Agriculture Decisions 964, 968.
>
> To make such an order effective and sufficiently definite, the respondent should be required, during the four-year period, either to pay for produce within the specific time periods set forth in the regulations or, if not, to have express agreements for specific times within which payment may be made. Written confirmations, memoranda, or other documents must be prepared with respect to such agreements specifically setting forth such express agreements, and payment must be made within such agreed periods.

Respondent argues (Appeal, pp. 14-16) that it did not receive the notice and opportunity to demonstrate or achieve compliance as provided in the Administrative Procedure Act (5 U.S.C. 558 (c)). As stated above, the violations in this case were clearly willful. See *In re Henry S. Shatkin*, 34 Agr. Dec. 296, 298-314 (1975), for

an extensive discussion of the meaning of "willful." Furthermore, even if respondent's violations had not been willful, the prior order issued in the 1971 disciplinary proceeding with respect to identical violations would satisfy the notice requirements of the Administrative Procedure Act.

Respondent's further argument that this disciplinary proceeding "can only be a product of selective enforcement and, accordingly, any suspension imposed thereto is arbitrary, capricious, and unathorized at law" (Appeal, p. 18) is also frivolous. A final order was issued in 1971 placing respondent on probation for four years because of its slow payment practices. All of the violations in this proceeding occurred during that four year probationary period. Irrespective of the number or size of violations that would trigger a disciplinary proceeding under normal circumstances, where a suspension order has been issued but held in abeyance during a probationary period, it would be a gross dereliction of complainant's responsibilities if complainant did not institute a disciplinary proceeding for violations of the order during the probationary period.

In addition, an examination of Agriculture Decisions reveals that a great number of proceedings have been instituted in recent years by complainant involving payment violations of the Act. But even if a particular violator were singled out for selective enforcement of the Act, such action would be legal so long as the administrative determination was not arbitrary (see *Moog Industries, Inc. v. F.T.C.*, 355 U.S. 411, 413-414; *FTC v. Universal-Rundle Corp.*, 387 U.S. 244, 251-252; see, also *Union Stock Yard Co. v. United States*, 308 U.S. 213, 222-224).

In determining that an additional 7 day suspension order is warranted as a result of respondent's present violations, Judge Liebert relied primarily on the fact that a 14 day suspended suspension was issued in 1971 with respect to respondent's similar violations. Specifically, Judge Liebert stated, after quoting extensively from the 1971 decision (Initial Decision, pp. 20-21):

> The evidence in the instant case discloses that Respondent does approximately three and one-half to four million dollars worth of business a year, employs from 25 to 30 employees, and has been in operation for over 40 years. Both of the sellers eventually, after the issuance of compelling reparation Orders, were paid. The underlying facts in the instant case were similar in amounts involved and economic impact to those which were involved in the previous action resulting in the 1971 Decision.
>
> In the previous Decision the threat of license suspension for 14-days was considered to be a sufficient deterrent to cause Respondent to comply with the Act. It was not. However, the realities of an actual suspension is a matter of considerably more deterrent weight. This is the effect of the institution of the sanction in the Judicial Officer's Order. Obviously, the Judicial Officer regarded a 14-day suspension to be a heavy one under the circumstances. It will impact now. Every additional day added to that suspension has more weight because of the cumulative effect on Respondent's business.

> In full consideration of the facts in the instant case, and applying our understanding of the Judicial Officer's policy as set forth above, we conclude that an additional sanction of a 7 days suspension is warranted. The effect of this action will be to suspend Respondent's operations for a period of 21 days from the effective date of the Order entered herein.

The foregoing analysis misreads the thrust of the 1971 decision as to respondent and ignores later precedents. The 14 day suspension order, which was suspended on condition that respondent did not commit further violations during the next four years, was a very light sanction. The light sanction was imposed because "as far as the record shows, the respondent not only thought that it had implied agreements which justified delays in payment, but the respondent also notified the complainant of its views on a number of occasions, and there is no evidence in the record that the complainant ever corrected the respondent's misunderstanding" (Ex. No. 1, pp. 79-80).

In the petition for reconsideration in that case, it was stated (Ex. No. 4, p. 8):

> If this decision raises expectations in the industry of lenient sanctions for serious or flagrant violations, their expectations will be short-lived. For example, I have just filed a Tentative Decision in a case under another regulatory statute in which I agreed with the Hearing Examiner's findings as to the violations but increased the recommended suspension of 45 days to three years.

> The lenient sanction was issued in this case solely because the complainant failed to prove a convincing case. As explained in the decision, the respondent advised the complainant in writing of its construction of the Act and regulations on a number of occasions and — as far as the record shows — the complainant made no effort to inform the respondent that it disagreed with its construction.

In two later slow payment cases which are comparable insofar as the amount of money involved is concerned, but which involve more sellers and transactions, I suspended the licenses of the respondents for 70 days for their slow payment violations. *In re Southwest Produce*, 34 Agr. Dec. 160, 178 (1975), affirmed *sub nom. Southwest Produce, Inc. v. Butz*, 524 F.2d 977 (C.A. 5); *In re J. Acevedo & Sons*, 34 Agr. Dec. 120, 145 (1975), affirmed *sub nom. J. Acevedo & Sons v. United States*, 524 F.2d 977 (C.A. 5). In both cases I explained why the "lenient" sanction was issued in the 1971 *American Fruit Purveyors* case (*Acevedo, supra*, 34 Agr. Dec. at 137-138; *Southwest, supra*, 34 Agr. Dec. at 176-177).

It is the policy of this Department to impose severe sanctions for serious violations of any of the regulatory programs administered by the Department to serve as an effective deterrent not only to the respondents but also to other potential violators. This policy has been followed in all of the Department's disciplinary proceedings in recent years. The basis for that policy is set forth at great length in numerous decisions. See, *e.g.*, *In re Braxton M. Worsley*, 33 Agr. Dec. 1547,

1556-1571 (1974), set forth in the Appendix to this Decision.[2] (This same Appendix has been included as an appendix to most of the decisions filed in recent years, including the *Acevedo* and *Southwest* decisions referred to above).

Respondent's violations are serious and flagrant because of the large sums of money involved, the substantial periods involved before final payment was made and the fact that respondent was on probation because of prior similar violations. Respondent's conduct reveals a callous disregard for the requirements of the Act and the prior probationary order.

It would seem that a much longer suspension period than the 30 additional days recommended by complainant

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[2]Severe sanctions issued pursuant to this policy were sustained in *In re Livestock Marketers*, 35 Agr. Dec. 1552, 1561 (1976), affirmed *sub nom. Livestock Marketers, Inc. v. United States*, 558 F.2d 748 (C.A. 5), certiorari denied, 46 L.W. 3649; *In re Sam Leo Catanzaro*, 35 Agr. Dec. 26, 31-32 (1976), affirmed *sub nom. Catanzaro v. United States and Butz*, No. 76-1613 (C.A. 9), decided March 9, 1977 (36 Agr. Dec. 467); *In re M. & H. Produce Co.*, 34 Agr. Dec. 700, 750 (1975), affirmed (without opinion) *sub nom. M. & H. Produce Co. v. Knebel and United States*, 549 F.2d 830 (C.A. D.C.), certiorari denied, 98 Sup. Ct. 394; *In re Maine Potato Growers*, 34 Agr. Dec. 773, 796 (1975), affirmed *sub nom. Maine Potato Growers, Inc. v. Butz*, 540 F.2d 518 (C.A. 1); *In re Southwest Produce*, 34 Agr. Dec. 160, 178 (1975), affirmed *sub nom. Southwest Produce, Inc. v. Butz*, 524 F.2d 977 (C.A. 5); *In re J. Acevedo & Sons*, 34 Agr. Dec. 120, 145 (1975), affirmed *sub nom. J. Acevedo & Sons v. United States*, 524 F.2d 977 (C.A. 5); *In re Marvin Tragash Co.*, 33 Agr. Dec. 1884, 1914 (1974), affirmed *sub nom. Marvin Tragash Co. v. United States Dept. of Agr.*, 524 F.2d 1255 (C.A. 5); *In re Trenton Livestock*, 33 Agr. Dec. 499, 539 (1974), affirmed *sub nom. Trenton Livestock, Inc. v. Butz*, 510 F. 2d 966 (C.A. 4); *In re James J. Miller*, 33 Agr. Dec. 53, 64 (1974), affirmed *sub nom. Miller v. Butz*, 498 F.2d 1088, 1089 (C.A. 5).

on appeal might be appropriate. But in view of the tremendous size of respondent's business, and the policy of the Judicial Officer never to increase the sanction recommended by the administrative officials, respondent's registration will be suspended for 30 days for its present violations, and for 14 additional days under the 1971 order.

Respondent contends that it is presently complying with the payment requirements of the Act, but that does not make inappropriate the suspension referred to above for respondent's past violations. See *In re L. R. Morris Produce Exchange*, 37 Agr. Dec. 1112, 1119-1120 (1978); *In re Sam Leo Catanzaro*, 35 Agr. Dec. 26, 35 (1976), affirmed *sub nom. Catanzaro v. United States and Butz*, No. 76-1613 (C.A. 9), decided March 9, 1977 (36 Agr. Dec. 467); *In re J. Acevedo & Sons*, 34 Agr. Dec. 120, 135 (1975), affirmed *sub nom. J. Acevedo & Sons v. United States*, 524 F.2d 977 (C.A. 5). See, also, *In re DeJong Packing Company*, 36 Agr. Dec. 1181, 1218-1220 (1977), appeal pending.

Order

Respondent's license is suspended for a period of 14 days for violation of the Order of the Judicial Officer entered on October 29, 1971.

Respondent's license is suspended for a further period of 30 days for the violations found in the instant proceeding. The periods of the suspensions shall run consecutively.

This Order shall take effect on the 15th day after service on the Respondent.

Done at Washington, D.C.

September 28, 1979

/s/ Donald A. Campbell
Donald A. Campbell
Judicial Officer
Office of the Secretary

Excerpt from *In re Braxton McLinden Worsley*, 33 Agriculture Decisions 1547, 1556-1571 (1974):

U.S.D.A. Sanction Policy

It is the policy of the Department to impose severe sanctions upon respondents who have engaged in serious or repeated violations of the regulatory laws administered by the Department.

The imposition of a severe, administrative sanction is never a pleasant task. A license suspension or revocation order prevents a person from engaging in his chosen business for a specified period, or permanently. This can cause great hardship, not only to the individual violator, but to his family, employees, and customers.

It is much easier and more pleasant to be "charitable" to the violator, putting more emphasis on his needs than the needs of society. The noted German philosopher Nietzsche observed almost a century ago:

> There is a point in the history of society when it becomes so pathologically soft and tender that among other things it sides even with those who harm it, criminals, and does this quite seriously and honestly. Punishing somehow seems unfair to it, and it is certain that imagining "punishment" and "being supposed to punish" hurts it, arouses fear in it. "Is it not enough to render him *undangerous*? Why still punish? Punishing itself is terrible."[1]

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[1]Nietzsche, *Beyond Good and Evil* (1886; Kaufmann Trans., 1966), §201, p. 114.

Similarly, in administering regulatory programs, there is a danger that the agency may become so "pathologically soft and tender" that it fails to achieve the purpose of the legislators who enacted the remedial statutes.

Since the Department of Agriculture administers approximately 50 regulatory statutes — more than any other agency — it is important that the Department administer the statutes in a manner to achieve the Congressional purposes.

The sanction policy that has been followed in the Department's administrative, disciplinary proceedings decided in the last two years is set forth at length below. Most of this language is taken verbatim from prior decisions. See, *e.g.*, *In re George Rex Andrews*, 32 Agriculture Decisions 553, 563-583 (1973); *In re American Commodity Brokers*, 32 Agriculture Decisions 1765, 1799 (1973); *In re James J. Miller*, 33 Agriculture Decisions 53, 64-80 (1974), affirmed *sub nom. Miller v. Butz*, ____ F.2d ____ (C.A. 5), decided August 8, 1974; *In re J. A. Speight*, 33 Agriculture Decisions 280, 318 (1974).

The administrative proceeding in this case does not partake of the essential qualities of a criminal proceeding. In permitting a person to engage in a Federally regulated business, the Government has, in effect, granted him a privilege. Suspension of the privilege for failure to comply with the statutory standard "is not primarily punishment for a past offense but is a necessary power granted to the Secretary of Agriculture to assure a proper adherence to the provisions of the Act." *Nichols & Co. v Secretary of Agriculture*, 131

F.2d 651, 659 (C.A. 1). Accord: *Helvering v. Mitchell*, 303 U.S. 391, 399; *Kent v. Hardin*, 425 F.2d 1346, 1349 (C.A. 5); *Blaise D'Antoni & Associates, Inc. v. Securities & Exch. Com'n*, 289 F.2d 276, 277 (C.A. 5), certiorari denied, 368 U.S. 899; *Eastern Produce Co. v. Benson*, 278 F.2d 606, 610 (C.A. 3); *Cella v. United States*, 208 F.2d 783, 789 C.A. 7), certiorari denied, 347 U.S. 1016; *Irving Weis & Co. v. Brannan*, 171 F.2d 232, 235 (C.A. 2); *Nelson v. Secretary of Agriculture*, 133 F.2d 453, 456 (C.A. 7); *Board of Trade of City of Chicago v. Wallace*, 67 F.2d 402, 407 (C.A. 7), certiorari denied, 291 U.S. 680; and *Farmers' Livestock Commission Co. v. United States*, 54 F.2d 375, 378 (E.D. Ill.). See, also, *Ex Parte Wall*, 107 U.S. 265, 287-290; *Hawker v. New York*, 170 U.S. 189, 190-200; *Steuart & Bro. v. Bowles*, 322 U.S. 398, 406-407; *Brown v. Wilemon*, 139 F.2d 730, 731-732 (C.A. 5); Chamberlain, Dowling, and Hays, *The Judicial Function in Federal Administrative Agencies* (1942), pp. 93-95.

The function of an administrative sanction is "deterrence rather than retribution" (Schwenk, "The Administrative Crime, Its Creation and Punishment by Administrative Agencies," 42 *Mich. L. Rev.* (1943) 51, 85).

Under the foregoing authorities, the sanction should, *inter alia*, be adequate to deter the respondents from future violations.

In *Beck v. Securities and Exchange Commission*, 430 F.2d 673, 675 (C.A. 6), the Court questioned, without deciding, whether a suspension order may also be used to deter others in the regulated industry from committing similar violations. As far as I know, this is the only case

in which the use of an administrative sanction to deter others has been questioned. Previously, the use of an administrative sanction to deter others had been assumed to be proper. See, *e.g.*, *American Air Transport and Flight School, Inc., Enforcement Proceeding*, 2 Pike & Fischer Ad. L. 2d 213, 215 (C.A.B.). See, also, the dissenting opinion in *Beck v. Securities and Exchange Commission*, 413 F.2d 832, 834 (C.A. 6).

In cases arising under the Civil Aeronautics Act, it has been expressly held that the Civil Aeronautics Board has the power to "impose a suspension as a 'sanction' against specific conduct or because of its 'deterrence' value — either to the subject offender or to others similarly situated." *Pangburn v. C.A.B.*, 311 F.2d 349, 354 (C.A. 1). Accord: *Hard v. Civil Aeronautics Board*, 248 F.2d 761, 763-765 (C.A. 7), certiorari denied, 355 U.S. 960; *Wilson v. Civil Aeronautics Board*, 244 1F.2d 773, 773-774 (C.A. D.C.), certiorari denied, 355 U.S. 870.

The remedial provisions of a regulatory program would be drastically affected if the agency could consider the effect of sanctions only on the respondents and not on others. It is well recognized that persons regulated by a governmental agency keep abreast of administrative proceedings. The actions of potential violators could be significantly affected by the sanctions imposed against other persons. Eight years' experience in the administration of a regulatory progam has convinced me that it is necessary to consider, as a major factor, the effect of a sanction in a particular case not only on the violator, but on other potential violators, as well.

Socrates recognized that "the proper office of punishment is two-fold: he who is rightly punished ought either to become better and profit by it, or he ought to be made an example to his fellows, that they may see what he suffers, and fear and become better."[2]

Similarly, Plato said that no man is to be punished "because he did wrong, for that which is done can never be undone, but in order that, in the future times, he, and those who see him corrected, may utterly hate injustice, or at any rate abate much of their evil-doing."[3]

The deterrent effect of punishment of one violator on potential violators is recognized in Deuteronomy 13:10-11 (R.S.V.; see also, Deuteronomy 19:19-20), as follows:

> You shall stone him to death with stone * * *. And all Israel shall hear, and fear, and never again do any such wickedness as this among you.

In the field of criminal law, it is settled beyond question that one of the primary purposes of the penalty imposed on a particular violator is to deter other potential violators.

> * * * punishment, in this context [i.e., "general prevention"], is used not to prevent future

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[2]Encyclopaedia Brittannica, *The Great Ideas: A Syntopicon of Great Books of the Western World* (Vol. II, 1952) pp. 492-493.

[3]*Id.* at 492.

violations on the part of the criminal, but in order to instill lawful behavior in others.[4]

* * * deterrence * * * is aimed at the protection of society. By making a certain action a punishable offense, we expect that people will refrain from committing the offense through fear of punishment. * * *

The purpose of punishment as a deterrent * * * is also to demonstrate to the potential offender the consequences if he violates the law.[5]

* * * the deterrent value of a correctional system is not restricted to those who come into direct contact with it but applies to the whole population.[6]

* * * it is a primarily preventive consideration — having an eye to what is necessary to keep the people reasonably law-abiding — which today's legislators have in mind, too, when they define crimes and stipulate punishments.[7]

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[4]Andenaes, "The General Preventive Effects of Punishment," 114 *University of Pennsylvania Law Review* (1966), 949, 982.

[5]Gardiner, "The Purposes of Criminal Punishment," 21 *Modern Law Review* (1958), 117, 121.

[6]Gould and Namenwirth, "Contrary Objectives: Crime Control and the Rehabilitation of Criminals," in *Crime and Justice in American Society* (1971), 237, 246.

[7]Andenaes, "General Prevention — Illusion or Reality?," *The Journal of Criminal Law, Criminology and Police Science* (1952), 176, 177.

* * * *police regulations* which are such commonplaces in modern times: traffic ordinances, building codes, * * * regulations governing commerce, etc. Here there is no doubt that punishment for infraction has primarily a general-preventive function. Here nearly all of us are potential criminals.[8]

The purpose of punishment, be it a criminal sentence, a civil penalty, or punitive damages, is not to inflict suffering or to impose a loss on the offender. Its object is to act as a deterrent: first to discourage the offender himself from repeating his transgression; and, second, to deter others from doing likewise.[9]

Sentencing is * * * an exacting task in which the Court undertakes to * * * impose a sentence which will best protect society, deter others and punish * * * the offender.[10]

More controversial but certainly no less important [than deterrence of the individual violator] is the need for *deterrence*, "general prevention," of potential criminals who may be dissuaded from crime by the threat and the administration of penalties.[11]

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[8]Andenaes, "General Prevention — Illusion or Reality?," 43 *The Journal of Criminal Law, Criminology and Police Science* (1952), 176, 182.

[9]*Collins v. Brown*, 268 F. Supp. 198, 201 (D.C. D.C.).

[10]United States v. Mandracchia, 247 F. Supp. 1, 4 (D.N.H.).

[11]Tappan, *Crime, Justice and Correction* (1960), p. 243.

Penalties are not provided as punishment for the individual who has gone wrong. Their imposition is alone justified for the effect the punishment may have upon the convict in preventing him from continuance in crime and in teaching him that "the way of the transgressor is hard." But the still greater effect to be attained is the deterrent effect the sentence may have upon those who may be inclined to follow the criminal course upon which the convict has embarked.[12]

* * * deterrence looks primarily at the potential criminal outside the dock [of the courtroom] * * * .[13]

Punishment can protect society by deterring potential offenders * * * .[14]

* * * the greater the penalty, the "higher the costs associated with criminal activity," and the higher these costs, the fewer crimes committed.[15]

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[12]*Id.* at 243, fn. 5, quoting from *People v. Gowasky*, 219 App. Div. 19, 24, 25, 219 N.Y.S. 373, 380, affirmed, 244 N.Y. 451, 155 N.E. 737.

[13]Fitzgerald, *Salmond on Jurisprudence* (12th ed., 1966), §15, p. 94.

[14]*Ibid.*

[15]Berns, "Justified Anger: Just Retribution," *Imprimis* (Vol. 3, No. 6, June 1974), p. 3.

> One of these goals [of law] is deterrence by means of punishment. We punish in order to deter people from engaging in the undesirable conduct which we call crime.
>
> * * * deterrence, addresses itself * * * both to the individual himself — we hope he will be deterred in the future — and to the entire community.[16]

Perhaps the most salient authority for the proposition that one of the primary ends of punishment is to serve as a deterrent to other potential violators is Chief Justice William Howard Taft's statement written in 1928:

> * * * the chief purpose of the prosecution of crime is to punish the criminal and to deter others tempted to do the same thing from doing it because of the penal consequences.[17]

Johannes Andenaes, a leading authority from the University of Oslo, makes the same point, as follows: "From the point of view of sheer logic one must say that general prevention — *i.e.*, assurance that a minimum number of crimes will be committed — must have priority over special prevention — *i.e.*, impeding a particular criminal from future offenses."[18]

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[16]Puttkammer, *Administration of Criminal Law* (1953), 8.

[17]Menninger, *The Crime of Punishment* (1968), 194. The original statement of Chief Justice Taft's position appeared in his article, "Toward a Reform of the Criminal Law," in *The Drift of Civilization* (1929).

[18]Andenaes, "The General Preventive Effects of Punishment," 114 *University of Pennsylvania Law Review* (1966), 949, 952.

In other words, it is more important to the general welfare of society to consider the effect that a sanction will have on other potential violators than to consider the sanction needed to prevent the particular individual from again violating the law. In fact, it is not uncommon to have certain types of offenses committed where "there will practically never be an individual preventive need for punishment" and yet punishment "is necessary for general prevention."[19]

Whether punishment achieves the objective of deterring others from violating the law is questioned by some authorities,[20] but affirmed by many others.

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[19]Andenaes, "General Prevention — Illusion or Reality?," 43 *The Journal of Criminal Law, Criminology and Police Science* (1952), 176, 196.

[20]See, *e.g.*, Menninger, *The Crime of Punishment* (1968), preface, viii, and pp. 9, 108, 113, 206-208. However, even though Menninger believes that our present system of punishing criminals is a "crime" (*id.* at 28, 86, 280), he favors "penalties" for violators. He states (*id.* at 202-203):

> Certainly the abolition of punishment does not mean the omission or curtailment of penalties; quite the contrary. Penalties should be greater and surer and quicker in coming. I favor stricter penalties for many offenses, and more swift and certain assessment of them.
>
> But these are not *punishments* in the sense of long-continued torture — pain inflicted over years for the sake of inflicting pain. If I drive through a red light, I will be and should be penalized.

As an argument for the abolition of the deterrent doctrine, it is often maintained that neither the threat nor application of penalities does prevent crime. This position reflects the simplistic notion, too commonly prevailing in matters of social action, that nothing has been achieved merely because not everything is accomplished that we should like. It is sometimes said that high crime rates prove that sanctions do not deter or that penalties actually invite the crimes of men who seek punishment to dissolve their feelings of guilt. With tiresome frequency the illustration is cited of the pickpockets who actively plied their trade in the shadow of the gallows from which their fellow knaves were strung. These assertions have a superficial relevance but they do not dispose of the issue by any means.

Footnote 20 continued

* * *

If we disregard traffic signals we are penalized, not punished. If our offense was a calculated "necessity" in an emergency, then the fine is the "price" of the exception.

* * *

All legal sanctions involve penalties for infraction. But the element of punishment is an adventitious and indefensible *additional* penalty; it corrupts the legal principle of *quid pro quo* with a "moral" surcharge. Punishment is in part an attitude, a philosophy. It is the deliberate infliction of pain in addition to or in lieu of penalty. It is the prolonged and excessive infliction of penalty, or penalty out of all proportion to the offense.

Persons with a will to believe in the efficacy of an exclusively individualistic and positivistic correctional system often quote the words of Warden Kirchwey. His patent oversimplifications of man's behavioral motivations should be noted, for this sort of loose thinking and naive criminological idealism pervert the ends of correction.

* * *

It is true, certainly, that the Classical doctrine of deterrence appears crudely oversimple in the light of modern conceptions of human behavior. In terms of reasonable goals for today it proposed to accomplish both too much and too little. This doctrine of deterrence was substantially more sound, however, than the position taken by those who deny any preventive effect to criminal sanctions. It is maintained here that the penal law and its application do in fact deter; indeed, with the declining efficacy of other forms of social control, it must be relied upon increasingly to maintain standards of behavior that are essential to the survival and security of the community. A complete failure of legal prevention cannot be inferred from the serious crimes committed by a small per cent of the population any more than can its success by the law obedience of the great preponderance of men. The matter is not so simple.[21]

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[21]Tappan, *Crime, Justice and Correction* (1960), pp. 245, 246.

> * * * [as to studies] indicating that the death penalty is ineffective as a deterrent to murder, their very broad interpretation has rendered a disservice to the more general issue of punishment as a deterrent to all kinds of criminal behavior. Such an expansive conclusion is obviously not justified since murder is, in many ways, a unique kind of offense often involving very strong emotions.[22]
>
> * * *
>
> It is naive to suppose that punishment exists in a vacuum and is unrelated to the specific kinds of acts and the meaning which the punishment has for the actor.[23]

That sanctions do, in fact, serve as a deterrent to "white-collar" violations is evidenced by a number of studies.

> As Sutherland's analysis of white-collar crime has shown, violators of the Sherman Antitrust law are relatively free from criminal prosecution, though the imposition of punishment would be *maximally effective* with this type of offense.[24]

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[22]Chambliss, "The Deterrent Influence of Punishment," 12 *Crime & Delinquency* (1966), 70, 71.

[23]*Id.* at 75.

[24]Chambliss, "Types of Deviance and the Effectiveness of Legal Sanctions," 1967 *Wisconsin Law Review* 703, 716 (emphasis supplied).

> *An intensive study of parking violators indicates that * * * an increase in the severity and certainty of punishment does act as a deterrent to further violation. These findings suggest the necessity for a reappraisal of current thinking. Studies demonstrating the ineffectuality of punishment as a deterrent to certain types of offenses should not be interpreted to mean that punishment is ineffective in deterring all types of offenses.*[25]

Since one of the main purposes of a criminal law sentence is to deter other potential violators from committing similar violations, it follows, *a fortiori*, that one of the main purposes of an administrative law sanction is to deter other potential violators. In criminal law, "[r]etribution or social retaliation, though persistently criticized by modern advocates of a progressive penology, [illegible] to be a major ingredient of our penal law and [illegible] system."[26] "The principle of retribution was formulated in the *lex talionis*, the Mosaic doctrine expressed in *Deuteronomy*, 19:21: 'Thine eye shall not pity, but life shall go for life, eye for eye, tooth for tooth, hand for hand, foot for foot.' "[27] But retribution or social retaliation is not one of the objectives of

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[25]Chambliss, "The Deterrent Influence of Punishment," 12 *Crime & Delinquency* (1966), 70.

[26]Tappan, *Crime, Justice and Correction* (1960), p. 241. See, also, Berns, "Justified Anger: Just Retribution," *Imprimis* (Vol. 3, No. 6, June 1974); Encyclopaedia Brittanica, *The Great Ideas: A Syntopicon of Great Books of the Western World* (Vol. II, 1952), pp. 448-492.

[27]Tappan, Crime, Justice and Correction (1960), p. 241, fn. 3.

administrative sanctions — they are to "assure a proper adherence to the provisions of the Act" (*Nichols & Co. v. Secretary of Agriculture, supra*). Hence deterrence — both as to the individual violator, and as to other potential violators — is the primary, if not the only, objective of an administrative sanction.

To serve as an effective deterrent to potential violators of a regulatory statute, I believe that administrative sanctions should be severe; sanctions which are too lenient, rather than being a deterrent, will serve as a catalyst for violations by others. Not all criminologists, sociologists, or jurists share this view; but many noted authorities do.

> Since the power of a legal threat to function as a simple deterrent comes from the unpleasantness of the consequences threatened, one natural strategy for increasing the deterrent efficacy of threats is to increase the severity of threatened consequences. The theory of increased penalties as a marginal deterrent is simple and straightforward: all other things being equal, an increase in the severity of consequences threatened should reduce the number of people willing to run the risk of committing a particular criminal act * * *.[28]

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[28]Zimring, *Perspectives on Deterrence*, Crime and Delinquency Issues, A Monograph Series, National Institute of Mental Health — Center for Studies of Crime and Delinquency (1971), 83-84.

* * *

* * * when penalties for criminal activity that many people find attractive are quite low, thereby making crime a reasonable alternative to legitimate means of obtaining gratification for many persons, even a high probability of apprehension may leave a high rate of the threatened behavior, and increases in the severity of threatened consequences can be expected to have a more substantial marginal deterrent effect than if the level of consequences threatened is already quite high in relation to the benefits obtainable through criminal means.[29]

* * *

* * * If potential offenders believe that their chances of apprehension cannot be dismissed, the risk of a high penalty provides more incentive to avoid crime than the risk of a low penalty.[30]

* * *

* * * It is likely that increases in the severity of threatened consequences are more or less significant, depending on the relationship between size of penalty increase and size of base penalty.[31]

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[29] *Id.* at 84.

[30] *Id.* at 85.

[31] *Id.* at 89.

> If we are hopeful of the curative effects of a threat, we have to make the threat unpleasant, which is another way of saying that we have to be severe.[32]

Dr. Zimring, a noted authority, capsulizes this concept in answering the question, "how can the legal system make the best use of variations in severity [of sanctions] to achieve social defense?" by stating:[33]

> One answer is that, since the goal of all legal threats is to keep the population law abiding, the potential effectiveness of variations in severity of threatening consequences should be used to create the widest possible distinction between criminal and non-criminal behavior by threatening all types of serious crime with penalties which are as severe as possible. The aim of this strategy is to create a walled fortress around criminal activity by using the full power of threatened consequences to keep potential criminals from becoming actual criminals.
>
> Another possible strategy would be to threaten all serious crimes with major penalties, but to save a considerable amount of variation in threatened penalties to underscore distinctions between *types of crime*, as well as between serious crime and law-abiding behavior.

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[32]Puttkammer, *Administration of Criminal Law* (1953), 16-17.

[33]Zimring, *Perspective on Deterrence*, Crime and Delinquency Issues, a Monograph Series, National Institute of Mental Health — Center for Studies of Crime and Delinquency (1971), 90.

Johannes Andenaes, of the University of Oslo, regarded by many as one of the most distinguished of the modern scholars writing about deterrence, states that the "simplest way to make people more law-abiding, therefore, is to increase the punishment."[34] Mr. Andenaes believes that Feuerbach's formula of psychological coercion: "the risk for the lawbreaker must be made so great, the punishment so severe, that he knows he has more to lose than he has to gain from his crime" has a "certain validity" as to violators of "economic regulations."[35] "(E)conomic crimes," to utilize his epithet, are clearly within the purview of the foregoing severity doctrine, such crimes being violations of "governmental regulation of the economy: price violations, rationing violations, unlawful foreign exchange transactions, offenses against workers protection, disregard of quality standards, and so on."[36]

The applicability of severe sanctions to deter violations of "regulations governing commerce" and other "economic" regulations is succinctly treated by Andenaes:

> I shall begin with a group of crimes which play a modest role in the literature but which have a good deal of practical importance and

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[34]Andenaes, "General Prevention — Illusion or Reality?," 43 *The Journal of Criminal Law, Criminology and Police Science* (1952), 176, 191.

[35]Andenaes, "General Prevention — Illusion or Reality,"? 43 *The Journal of Criminal Law, Criminology and Police Science* (1952), 176, 178-179, 185.

[36]*Id.* at 184.

are good for illustration, all these *police regulations* which are such commonplaces in modern times: traffic ordinances, building codes, laws governing the sale of alcoholic beverages, regulations governing commerce, etc. Here there is no doubt that punishment for infraction has primarily a general-preventive function. Here nearly all of us are potential criminals. A public-spirited citizen has, of course, certain inhibitions against breaking laws and regulations. But experience shows that moral and social inhibitions against breaking the law are not enough in themselves to insure obedience, where there is conflict with one's private interests. Thus the extent to which there can be effective enforcement by means of punishment determines to what extent the rules are actually going to be observed.[37]

* * *

A large number of the people who are affected by economic regulations * * * feel no strong moral inhibition against infraction. They often find excuses for their behavior in political theorizing: they oppose the current government's regulative policies; * * *. Yet the matter of obedience or disobedience can often have important economic consequences. * * * In this area, at any rate, Feuerbach's law of general

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[37]Andenaes, "General Prevention — Illusion or Reality,"? 43 *The Journal of Criminal Law, Criminology and Police Science* (1952), 176, 182.

> prevention has a certain validity: it is necessary that consideration as to the risk involved in breaking the law should outweigh consideration of the advantages to breaking the law.[38]

Andenaes is careful to note that severity of punishment has a more salient effect on crimes, like economic violations, "committed after careful consideration * * * than for crimes which grow out of emotions or drives which overpower the individual (e.g. the so-called crimes of passion)."[39]

Isaac Ehrlich, in one of the most sophisticated analyses of criminal activity ever made, using a simultaneous equation model for a regression analysis involving fourteen variables, found that the "rate of specific crime categories, with virtually no exception, varies intensively with estimates of the probability of apprehension and punishment by imprisonment * * * and with the average length of time served in state prisons * * *."[40]

Similarly, Professor Gordon Tullock states that "multiple regression studies show that increasing the frequency *or severity* of the punishment does reduce the likelihood that a given crime will be committed" (emphasis supplied).[41] Professor Tullock concludes: "We

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[38] *Id.* at 185.

[39] *Id.* at 192.

[40] Ehrlich, "Participation in Illegitimate Activities: A Theoretical and Empirical Investigation," *Journal of Political Economy,* Vol. 81 (May-June, 1973) p. 545.

[41] Tullock, "Does Punishment Deter Crime?" *The Public Interest* (No. 36, Summer 1974), 103, 109.

have an unpleasant method – deterrence – that works, and a pleasant method – rehabilitation – that (at least so far) never has worked."[42]

My views with respect to the necessity for severe sanctions for serious violations, in order to achieve the Congressional purpose of the Department's regulatory programs, were set forth in *In re Sy B. Gaiber & Co.*, in a Ruling on Petition for Reconsideration, as follows (31 Agriculture Decisions 843, 850-851 (1972)):

> Congress enacted the remedial regulatory programs administered by the Department because of a need for economic law and order in the marketplace. The administrative sanctions imposed against violators of such regulatory programs should tend to achieve that purpose.
>
> Persons who engage in a regulated business have been granted a privilege. Suspension or revocation of the privilege for failure to comply with the statutory standards is a necessary power granted to the Secretary to assure a proper adherence to the regulatory program (see the cases cited in the Decision and Order herein, p. 47). Just as a lawyer may lose his privilege to practice law if he embezzles a client's funds or engages in other serious violations, a futures commission merchant, broker, or trader who manipulates a futures market or engages in other serious violations may lose his privilege to engage in futures trading.

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[42] *Id.* at 110.

It is the general administrative practice under the Department's regulatory programs to institute formal actions only as to violations regarded as serious or repeated. Many minor violations are disposed of with a warning letter or an informal stipulation. Hence it is to be expected that the relatively few formal cases which are instituted will generally warrant relatively severe sanctions.

To summarize, a strong argument can be made in support of any philosophy of punishment or sanctions, ranging from extremely light to very severe. There are many excellent judges, criminologists, and sociologists at either end of the poles of this issue; many others take a position between the poles. For the reasons set forth above, where the violation is serious or repeated, I believe in severe sanctions to deter future violations by the respondent and others.

Another principle in determining the sanction to be imposed in a particular case is that, in general, there should be a reasonable relationship between the sanction and the unlawful practices found to exist.[43] In

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[43]*Kent v. Hardin*, 425 F.2d 1346, 1349-1350 (C.A. 5); *G. H. Miller & Company v. United States*, 260 F.2d 286, 295-297 (C.A. 7, *en banc*), certiorari denied, 359 U.S. 907; *Daniels v. United States*, 242 F.2d 39, 42 (C.A. 7), certiorari denied, 354 U.S. 939; *Irving Weis & Co. v. Brannan*, 171 F.2d 232, 235 (C.A. 2); *In re American Fruit Purveyors, Inc.*, 30 Agriculture Decisions 1542, 1596 (1971); *In re Louis Romoff*, 31 Agriculture Decisions 158, 177 (1972). See, also, *American Power Co. v. S. E. C.*, 329 U.S. 90, 112-118; *Phelps Dodge Corp. v. Labor Board*, 313 U.S. 177, 194; *Great Western Food Distributors v. Brannan*, 201 F.2d 476, 484 (C.A. 7), certiorari denied, 345 U.S. 997; *In re Electric Power & Light Corporation*, 176 F.2d 687, 692 (C.A. 2); *Wright v. Securities and Exchange Commission*, 112 F.2d 89, 95 (C.A. 2).

other words, the more serious the violation, the more severe should be the sanction. Even though punishment for the sake of punishment is not a relevant consideration in the field of administrative law, the principle of having a reasonable relationship between the violation and the sanction still has validity in a case of this nature. This is because in order to achieve the major Congressional purposes of the regulatory program, it is more important to deter serious violations than minor violations. Hence a severe sanction for a serious violation will have a greater deterrent effect than a milder sanction for a lesser violation, and thus will tend to effectuate the major objectives of the regulatory program.

In addition, in determining sanctions to be imposed under the Act, great weight should be given to the recommendation of the officials charged with the responsibility for administering the regulatory program. See *In re Sy B. Gaiber & Co.*, Ruling on Reconsideration, 31 Agriculture Decisions 843, 845-846 (1972). Such administrative officials, during the day-to-day administration of a regulatory program, develop a "feel" for the severity of sanctions needed to serve as a deterrent to violations that cannot be developed by the Administrative Law Judges or the Judicial Officer, who come in contact with only a small part of the regulatory program.

The recommendation of the administrative officials as to the sanction is not, of course, controlling. For example, if some of the allegations are not proven or if there are mitigating circumstances not taken into consideration by the administrative officials, the sanction may be considerably less than that recommended by them. See, *e.g.*, *In re American Fruit Purveyors, Inc.*,

30 Agriculture Decisions 1542 (1971). But if the alleged violations are proven, and it appears that the administrative officials have fully considered the respondent's contentions, the recommendation of the administrative officials as to the sanction needed to serve as an effective deterrent to the respondent and to other potential violators should be given great weight. Recognizing the greater opportunity for such administrative officials to develop expertise in this area, it will be the policy of the Judicial Officer never to increase the sanction recommended by the administrative officials

Insofar as practicable, the sanctions imposed under a regulatory Act against comparable violators for comparable violations should be reasonably uniform.[44] From the beginning, the Judicial Officer has recognized that "[d]isciplinary action taken under * * * [a regulatory] act should follow some general pattern, * * * so that one order will not be entirely out of line with another involving similar violations." *In re Watkins Commission Company, Inc.*, 4 Agriculture Decisions 395, 400 (1945). See, also, *In re Arnold Fairbank*, 27 Agriculture Decisions

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[44]Inequality in judicial sentencing occurs "every day, often in different courtrooms in the same courthouse. Two boys fail to report for military induction — one is sentenced to five years in prison, the other gets probation and never enters a prison. One judge sentences a robber convicted for the third time to one year in prison, while another judge on the same bench gives a first offender ten years. One man far more capable of serious crime than another and convicted of the same offense may get a fine, while the less fortunate and less dangerous person is sentenced to five years in the state penitentiary." Clark, *Crime in America* (1970), p. 224. There is no excuse for such erratic sanctions in administrative disciplinary proceedings before a single agency.

1371, 1384 (1968); *In re Nolen E. Poovey, Jr.*, 27 Agriculture Decisions 1512, 1520-1522 (1968); *In re Boone Livestock Company, Inc.*, 27 Agriculture Decisions 475, 503 (1968); *In re Milton Silver, d/b/a Chambersburg Livestock Sales*, 21 Agriculture Decisions 1438, 1452 (1962); *In re American Fruit Purveyors, Inc.*, 30 Agriculture Decisions 1542, 1595-1596 (1971); *In re Louis Romoff*, 31 Agriculture Decisions 158, 177 (1972).[45]

In determining whether one case is comparable to another, all of the relevant facts and circumstances must be considered, such as the nature of the violations, the nature of the respondents' businesses, the respondents' prior record as to violations, the deliberateness of the violations, prior warnings given to the respondents, etc.

Also, the goal of uniform sanctions for comparable violations necessarily applies only to contested cases. Consent orders issued without a hearing should be given no weight whatsoever in determining the sanction to be imposed in a litigated case. In a case where a consent order is agreed to by the parties, there is no record or argument to establish the basis for the sanction. It may seem less than appears warranted because of problems of proving the allegations of the complaint or because of mitigating circumstances not revealed to the Administrative Law Judge or the Judicial Officer. Other circumstances, such as personnel and budget

[45]Accordingly, counsel should, in all cases, in their briefs and arguments, refer to *relevant* prior cases under the Act which should be considered in determining the appropriate sanction to be imposed in the particular case, in the event a violation is found to have occurred.

considerations and the delay inherent in litigation, may also cause a consent order to seem less severe than appropriate. Conversely, a consent order may seem more severe than appears warranted because of aggravated circumstances not revealed by the complaint.

In some cases, following the "deterrent policy" set forth above may lead to the imposition of a sanction more severe than the sanctions previously imposed under the Act for similar violations. If so, uniformity must yield to effectiveness. An effective sanction will be issued in such cases even if it is more severe than sanctions previously imposed for similar violations. In such circumstances, uniformity will be achieved only as to cases subsequent thereto.

In other words, uniformity is a desirable goal; but it is not an absolute requirement. A respondent has no inherent right to a sanction no more severe than that applied to others. See *Hiller v. Securities and Exchange Commission*, 429 F.2d 856, 858-859 (C.A. 2); *G. H. Miller & Company v. United States*, 260 F.2d 286, 296 (C.A. 7), certiorari denied, 359 U.S. 907. As the Court held in *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 186: "We read the Court of Appeals' opinion to suggest that the sanction was 'unwarranted in law' because 'uniformity of sanctions for similar violations' is somehow mandated by the Act. We search in vain for that requirement in the statute."

An agency is free to reconsider sanctions previously imposed without prior notice. *Communications Comm'n v. WOKO*, 329 U.S. 223, 228; *Continental Broadcasting v. Federal Comm. Comm'n.*, 439 F.2d 580, 582-584 (C.A. D.C.); *N.L.R.B. v. Majestic Weaving Co.*, 355 F.2d 854,

860 (C.A. 2); quoted with approval in Davis, *Administrative Law Treatise* (1970 Supp.), §17.08, p. 604.

In *Communications Comm'n v. WOKO*, 329 U.S. 223, 228, the Court held: "Much is made in argument of the fact that deceptions of this character have not been uncommon and it is claimed that they have not been dealt with so severely as in this case. * * * The mild measures to others and the apparently unannounced change of policy are considerations appropriate for the Commission in determining whether its action in this case is too drastic, but we cannot say that the Commission is bound by anything that appears before us to deal with all cases at all times as it has dealt with some that seem comparable."

Similarly, in *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187, the Court held that the "employment of a sanction within the authority of an administrative agency is thus not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases."

As I stated in *In re Sy B. Gaiber & Co.*, Ruling on Reconsideration, 31 Agriculture Decisions 843, 850 (1972):

> In any case in which the Judicial Officer determines that the sanctions previously imposed for similar violations are not adequate under present circumstances to effectuate the purposes of the regulatory program, a more severe sanction will be imposed in that case, rather than merely announcing that in future cases the sanction will be increased. An

administrative agency is free to reconsider sanctions previously imposed without prior notice (see *In re Louis Romoff*, 31 Agriculture Decisions 158, 186, and cases cited therein), and such practice will be routinely followed. Persons who intentionally violate a regulatory program are not playing a game under which they are entitled to consider the sanctions previously imposed for similar violations and determine whether they want to run the risk of detection and the imposition of such a sanction. They run the distinct risk that a more severe sanction will be imposed against them.

To conclude this extended discussion as to the Department's sanction policy, Congress has determined that there is a need for Federal regulation of the agricultural marketing system. To achieve the Congressional purposes with respect to the various remedial statutes administered by the Department, severe sanctions must be imposed for serious violations. We have no reasonable alternative. "For whatever our opinion may be on the question of free versus controlled economy, there is no denying that ineffective regulation is the worst arrangement of them all."[46]

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[46]/Andenaes, "General Prevention — Illusion or Reality?," 43 *The Journal of Criminal Law, Criminology and Police Science* (1952), 176, 184.

CERTIFICATE OF SERVICE

Petitioner, AMERICAN FRUIT PURVEYORS, INC., by and through its undersigned counsel, hereby certifies that three (3) true and correct copies of this Petition for Writ of Certiorari have been mailed this _____ day of January, 1981, to each of the following:

SOLICITOR GENERAL OF THE UNITED STATES
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UNITED STATES DEPARTMENT OF
AGRICULTURE
OFFICE OF THE SECRETARY
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I FURTHER CERTIFY that a true and correct copy of this Petition For Writ of Certiorari was mailed this _____ day of January, 1981, to each of the following:

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No. 80-1215

In the Supreme Court of the United States

OCTOBER TERM, 1980

AMERICAN FRUIT PURVEYORS, INC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Secretary of Agriculture complied with the procedural requirements of 5 U.S.C. 558(c) in instituting proceedings seeking suspension of petitioner's license under the Perishable Agricultural Commodities Act (PACA), 7 U.S.C. 499b(4).

2. Whether the 44-day license suspension imposed on petitioner following 20 willful violations of the PACA was an abuse of discretion or the result of impermissible selective enforcement.

TABLE OF CONTENTS

Page

Opinion below 1

Jurisdiction 1

Statement 1

Argument 3

Conclusion 6

TABLE OF AUTHORITIES

Cases:

J. Acevedo and Sons v. *United States*, 524 F. 2d 977 5

Butz v. *Glover Livestock Comm'n Co.*, 411 U.S. 182 ..... 4, 5

Cargill, Inc. v. *Hardin*, 452 F. 2d 1154, cert. denied, 406 U.S. 932 3-4

Economou v. *United States Department of Agriculture*, 494 F. 2d 519 4

George Steinberg & Son, Inc. v. *Butz*, 491 F. 2d 988, cert. denied, 419 U.S. 830 4

Haltmier v. *CFTC*, 554 F. 2d 556 ..... 4, 5

Jacob Siegel Co. v. *FTC*, 327 U.S. 608 5

KWK Radio, Inc. v. *FCC*, 337 F. 2d 540, cert. denied, 380 U.S. 910 4

Koden v. *United States Department of Justice*, 564 F. 2d 228 3

H.P. Lambert Co. v. *Secretary of Treasury*, 354 F. 2d 819 4

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Page

Cases—Continued:

Maine Potato Growers, Inc. v. *Butz*, 540 F. 2d 518 5

Moog Industries, Inc. v. *FTC*, 355 U.S. 411 5

River Forest Pharmacy, Inc. v. *DEA*, 501 F. 2d 1202 5

Statutes and regulations:

Perishable Agricultural Commodities Act (PACA), as amended, 7 U.S.C. 499a *et seq.* 1

7 U.S.C. 499b 2
7 U.S.C. 499b(4) 1
7 U.S.C. 499f-499g 2
7 U.S.C. 499h(a) 3, 5

5 U.S.C. 558(c) 2, 3, 4

7 C.F.R. 46.2(aa)(5) 1

7 C.F.R. 46.2(aa)(9) 1

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-8) is reported at 630 F. 2d 370.

JURISDICTION

The judgment of the court of appeals (Pet. App. 9-10) was entered on November 13, 1980, and a petition for rehearing was denied on December 11, 1980 (Pet. App. 11). The petition for a writ of certiorari was filed on January 12, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner brought this suit to overturn a 44-day suspension of its license to engage in business as a fruit and vegetable dealer under the Perishable Agricultural Commodities Act (PACA), as amended, 7 U.S.C. 499a *et seq.* In 1969, petitioner purchased 17 lots of vegetables, which are considered perishable agricultural commodities, from five sellers but failed to make full payment promptly, in violation of 7 U.S.C. 499b(4) (Pet. App. 1). After a hearing, a Department of Agriculture Judicial Officer suspended petitioner's license for 14 days. The Judicial Officer suspended this disciplinary action, however, stating that the penalty would not become effective unless, within a four-year period beginning in February 1972, petitioner knowingly failed to pay for produce within ten days of receipt (Pet. App. 1-2). See 7 C.F.R. 46.2(aa)(5). The Judicial Officer also ruled that petitioner could avoid the ten-day requirement be establishing a different payment period by express written agreement with the seller and then actually making payment as agreed (Pet. App. 2). See 7 C.F.R. 46.2(aa)(9). Petitioner did not seek judicial review of this final administrative determination.

During the 1974 crop year, petitioner orally contracted for 21 separate shipments of produce from two companies

(Pet. App. 2-3). Petitioner paid promptly for only one shipment (*id.* at 2). Subsequently, in order to liquidate petitioner's accounts, both sellers agreed to accept post-dated checks from petitioner (*id.* at 2-3). Some of these checks were returned unpaid due to insufficient funds (*ibid.*). Both sellers then filed complaints with the Secretary of Agriculture seeking reparations. See 7 U.S.C. 499f-499g. It was only after administrative adjudication of the complaints in 1976 that petitioner fully paid for the 1974 shipments it received (Pet. App. 2-3).

Thereafter, the Agricultural Marketing Service, the agency that administers the PACA, filed a complaint charging petitioner with willful failure to make full payment promptly for the 20 lots of perishable agricultural commodities petitioner received from the two sellers (Pet. App. 3). Following an evidentiary hearing, an administrative law judge found that petitioner violated 7 U.S.C. 499b and also violated the terms of the prior probationary order (Pet. App. 3). After administrative review, petitioner's license was suspended for 30 days and the prior 14-day suspension was restored.[1]

Petitioner sought review in the court of appeals. The court upheld the administrative determination that petitioner violated the statute and the probationary order in failing to pay promptly for the produce it received from the two sellers in 1974 (Pet. App. 2, 5-6). The court also rejected petitioner's argument that the agency ignored the procedures specified in 5 U.S.C. 558(c) because it had not given

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[1]The ALJ suspended petitioner's license for seven days and restored the 14-day suspension assessed for the prior violations (Pet. App. 3). On administrative appeal by both parties, the Judicial Officer adopted the ALJ's findings but concluded that petitioner manifested " 'a callous disregard for the requirements of the Act and the prior probationary order' " (Pet. App. 4). He therefore increased the suspension to 30 days to run consecutively with the restored 14-day suspension (*ibid.*). The agency had sought a 90-day suspension in addition to the 14-day reinstated suspension (Pet. App. 3).

petitioner notice of the violations and an opportunity to comply (Pet. App. 4). The court noted that under Section 558(c) "no notice is necessary if the suspension proceeding is based on willfulness" (Pet. App. 7) and that under PACA "an action is willful if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements" (*ibid.*). It then ruled that "[n]o notice to [petitioner] was required in this case, [because] the finding of willfulness was correct" (*ibid.*). The court reasoned that, in light of the probationary order, "there is no possibility that [petitioner] did not know that failure to pay promptly was a violation of the regulations and the statute and that failure to obtain an express written agreement was a knowing violation of both the regulations and the 1971 order" (*ibid.*).

In addition, the court of appeals concluded that the sanction was not arbitrary or the result of impermissible selective enforcement of the statute (Pet. App. 7-8). The court remarked that the Secretary of Agriculture has broad discretion to fix an appropriate sanction and that 7 U.S.C. 499h(a) allows a license suspension for up to 90 days for each violation (Pet. App. 7). Here, the sanction imposed was entirely proper in light of petitioner's "flagrant intentional violations of the Act, the underlying regulations and the 1971 order" (*id.* at 8).

ARGUMENT

1. The proceedings leading to suspension of petitioner's license were conducted in accordance with statutory requirements. 5 U.S.C. 558(c) states that an agency generally must give notice and an opportunity to achieve compliance before instituting proceedings to suspend a license. But Section 558(c) expressly provides that this requirement is inapplicable "in cases of willfulness," *i.e.*, in cases where the conduct for which the agency seeks license suspension is

intentional. See, *e.g.*, *Koden* v. *United States Department of Justice*, 564 F. 2d 228, 234 (7th Cir. 1977); *Cargill, Inc.* v. *Hardin*, 452 F. 2d 1154, 1173 (8th Cir. 1971), cert. denied, 406 U.S. 932 (1972); *H.P. Lambert Co.* v. *Secretary of Treasury*, 354 F. 2d 819, 821 n.2 (1st Cir. 1965); *KWK Radio, Inc.* v. *FCC*, 337 F. 2d 540, 541 (D.C. Cir. 1964), cert. denied, 380 U.S. 910 (1965).

In this case, the Judicial Officer found that petitioner acted with " 'a callous disregard for the requirements of the Act and the prior probationary order' " (Pet. App. 4), and the court of appeals agreed that petitioner committed "flagrant intentional violations of the Act, the underlying regulations and the 1971 order" (*id.* at 8). Indeed, petitioner admits that it did not make full payment for the 1974 produce until 1976, after the produce sellers had instituted collection actions and final reparation orders in those cases had been issued (Pet. 6). As the court of appeals aptly concluded, "[i]n light of the 1971 order, there is no possibility that [petitioner] did not know that failure to pay promptly was a violation of the regulations and the statute and that failure to obtain an express written agreement was a knowing violation of both the regulations and the 1971 order" (Pet. App. 7). Thus, petitioner's misconduct was willful, and the notice and opportunity to comply provisions of 5 U.S.C. 558(c) were inapplicable. See, *e.g.*, *Butz* v. *Glover Livestock Comm'n Co.*, 411 U.S. 182, 185-189 (1973); *Haltmier* v. *CFTC*, 554 F. 2d 556, 562 (2d Cir. 1977); *George Steinberg & Son, Inc.* v. *Butz*, 491 F. 2d 988, 994 (2d Cir.), cert. denied, 419 U.S. 830 (1974); *H.P. Lambert Co.* v. *Secretary of Treasury*, *supra*, 354 F. 2d at 821 n.2.[2]

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[2] *Economou* v. *United States Department of Agriculture*, 494 F. 2d 519 (2d Cir. 1974), cited by petitioner (Pet. 3, 12-13), does not conflict with the decision in this case. In *Economou*, the court merely held that "the finding of willfulness appears erroneous on the record taken as a

2. Petitioner's assertion that the sanction in this case resulted from "unlawful selective enforcement of the Perishable Agricultural Commodities Act" (Pet. 14-16) is wholly without merit. The court below "perceive[d] no bias on the part of the ALJ or the Judicial Officer in rendering their decisions" and "no evidence of selective enforcement" (Pet. App. 8). The disciplinary proceedings against petitioner were instituted only after two sellers filed complaints with the Secretary when private attempts to obtain payments from petitioner had failed (Pet. App. 2-3).

Nor is the suspension imposed in this case a "gross abuse of discretion" (Pet. 16). As this Court has held, "[t]he fashioning of an appropriate and reasonable remedy is for the Secretary, not the court. The court may decide only whether, under the pertinent statute and relevant facts, the Secretary made 'an allowable judgment in [his] choice of the remedy.' " *Butz* v. *Glover Livestock Comm'n Co., supra*, 411 U.S. at 188-189, quoting *Jacob Siegel Co.* v. *FTC*, 327 U.S. 608, 612 (1946). The statute allows the Secretary to suspend a license for a period not to exceed 90 days for each violation. 7 U.S.C. 499h(a). A license may be suspended even without a finding of intentional misconduct. *Maine Potato Growers, Inc.* v. *Butz*, 540 F. 2d 518, 523 (1st Cir. 1976). Thus, given the facts of this case, which showed 20 "flagrant intentional violations of the Act" (Pet. App. 8), "the Judicial Officer was completely within his power and discretion in imposing a suspension of forty-four days"

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whole." 494 F. 2d at 519. Based upon the very different record in this case, however, the court below held that "the finding of willfulness was correct" (Pet. App. 7).

(*ibid.*).[3] See *Moog Industries, Inc.* v. *FTC*, 355 U.S. 411, 414 (1958); *Haltmier* v. *CFTC*, *supra*, 554 F. 2d at 563.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[3]It is permissible for the Judicial Officer to increase the sanction assessed by the ALJ. See *J. Acevedo and Sons* v. *United States*, 524 F. 2d 977, 979 (5th Cir. 1975); *River Forest Pharmacy, Inc.* v. *DEA*, 501 F. 2d 1202, 1206 (7th Cir. 1974). We also note that the statute allows the Secretary to revoke (rather than merely suspend) a license for flagrant or repeated misconduct. 7 U.S.C. 499h(a).